Case and Comment
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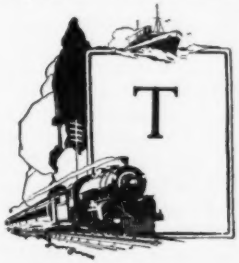
A Case Before the Federal Trade Commission

BY NATHAN B. WILLIAMS
Of the Washington, District of Columbia, Bar

[Ed. Note.—Mr. Williams, a member of the American Bar Association and of the Conference on Uniform State Laws, the author of the accompanying article, has prepared a monograph on the Federal Trade Commission law, which he expects to develop into a volume. He made for the house committee on judiciary a compilation of the state and Federal laws on trusts and monopolies, which was extensively used during the preparation in the Sixty-third Congress of the Clayton act and the Federal Trade Commission law.]



THE Federal Trade Commission is the newest agency of the Federal government having power and authority over business operations conducted by or through the agency or means of interstate commerce. It, however, has no jurisdiction over carriers who are already under the jurisdiction of the Interstate Commerce Commission, nor of banking operations, the measure of Federal control of which exists with the Treasury Department and the Federal Reserve Board.

The legislation of the Sixty-third Congress made two notable additions to the general subject of anti-trust laws.

(1) The first is the provision of the Clayton act which gives the individual or corporation the direct remedy of injunctive relief against threatened loss or damage by reason of a violation of the anti-trust laws. Heretofore, no one but the Attorney General could do other than sue for treble damages, which damages were generally found to be poor consolation.

(2) The second is the remedies afforded by the provisions of the Federal Trade Commission law, which is not an anti-trust act. The general theory of that part of this law, of main interest to the profession, is that it affords an opportunity to prevent the development of monopoly by timely application of its provisions, and of certain provisions of the Clayton act which the Commission has authority to enforce.

These provisions are § 5 of the Trade Commission act, which makes "unfair methods of competition in commerce unlawful;" § 2 of the Clayton law, which forbids price discrimination in certain cases; § 3 of Clayton act, which makes unlawful so-called "tying contracts,"

where the tendency is to suppress competition or develop monopoly; § 7 of that act, which forbids intercorporate stockholdings in certain kinds of cases; and § 8 of the same act, which, when it becomes effective on October 16 of this year, makes interlocking directorates between certain kinds of corporations engaged in commerce unlawful. These Clayton law provisions are also enforceable by injunctive process at the suit of an individual or corporation, or by the action of the Department of Justice.

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NATHAN B. WILLIAMS

The object of this paper is to acquaint the members of the bar as to how the Commission proceeds and in what way its machinery is set in motion. The limitations of this paper will permit only a brief allusion to the substantive features of the law which the Commission administers, and which is of direct importance to my professional brethren.

To the date of this writing (March 5) the Commission had issued only three formal complaints. It had, however, earlier issued a bulletin of conference rulings, forty in number, which noted the holding of the Commission in matters which it had considered, but which for various reasons had been adjusted or dismissed without the formality of the Commission making a complaint.

Each of these formal complaints against different defendants charges the use of an alleged "unfair method of competition in commerce." They are entitled: "Federal Trade Commission v. —." They set forth that the Commission has reason to believe that the defendant is using unfair methods of competition in commerce in violation of § 5 of the Trade Commission act, *"and it appearing that a proceeding by it in respect thereof would be to the interest of the public."*

The Commission complaint then proceeds to set out that the defendant is engaged in interstate commerce and states the place from which such commerce is conducted; the character of the business complained of, methods used, etc., and the effects and results of such methods on competitors and the public,—all charged with particularity and directness. The complaint then closes with a notice to the defendant that the complaint will be heard in Washington, District of Columbia, at the office of the Commission on a day therein fixed (in these complaints, April 5, or as soon thereafter as they can be reached); it informs the defendant that he has a right to appear at such time and place and show cause why an order should not be entered by the Commission requiring such defendant to cease and desist from the violation of law charged in the complaint. The defendant is also informed that he is required to file an answer in conformity to the rules of the Commission within thirty days after service of the complaint. All which is witnessed by the signature of the secretary and the seal of the Commission.

In the three instances mentioned the unlawful method charged is the selling in interstate commerce of goods labeled and branded with a word or words which

use the term "silk," when, as alleged, the product is in fact mercerized cotton, containing no part of worm silk.

These complaints are the response of the Commission to a petition filed with the Commission by the Silk Association of America, in which petition the various defendants were fully described, and the details and circumstances of their alleged unlawful practices set forth, with the same detail and exactness as would ordinarily be used in drawing a bill or complaint for equitable relief.

The rule of the Commission (rule II.), however, says: "Any person, partnership, corporation, or association may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction."

It is provided in this rule that this "application" shall be in writing and shall contain a short and simple statement of the facts constituting the alleged violation of law, with the name and address of the party making the complaint and of the party complained against.

This rule then further provides that the Commission shall investigate the matters complained of, and if the Commission has reason to believe that there is a violation of law over which the Commission has jurisdiction, it will issue and serve its complaint, fixing a hearing day at least forty days after the service of the complaint.

It is to be noted that it is not the complaint made to the Commission that is served upon the defendant, but the complaint of the Commission, which it prepares after such investigation as to it may seem proper.

Several very interesting questions arise in considering this matter of procedure.

While the phrase, "in the interest of the public," appears in the procedure provisions of § 5 of the Trade Commission act, this phrase is omitted in the provisions of the Clayton law, which authorizes the Commission to enforce the mentioned sections of that law. The rules of the Commission do not disclose any distinction as to the manner of treatment of "applications" for complaints, whether the violation alleged be of § 5 of the Trade Commission act or of §§ 2, 3, or 7 of the Clayton law. In either event it appears to be the conclusion of the Commission that it will draft and serve *its* complaint if convinced that a violation of law is charged, and the matter is not otherwise disposed of.

A difference of opinion, in degree at least, exists between some who have had occasion to study this law as to the real meaning of this phrase, "in the interest of the public."

It is contended in some quarters that it is jurisdictional. The writer confesses to the opposite view. It seems to me that it more nearly means the same thing as the words "public policy," as used in our jurisprudence. "Public policy" has been defined as being the "manifest will of the state." Jacoway v. Denton, 25 Ark. 625. Numerous other definitions to the same effect will occur to every lawyer.

The state, speaking through Congress, has expressed its will whereby it has made "unfair methods of competition in commerce" unlawful, and has authorized and directed the Trade Commission, a creature of the state, to prevent such violations. Instead of being jurisdictional, I regard this phrase as being rather in aid of the investigatory powers of the Commission, in that this perhaps gives the Commission the authority to carry on a John Doe complaint to find out the extent and character of a particular method of which it has heard only intermittent rumor.

Another way to look at this is that, inasmuch as lawyers and economists, those "geologists of politics," have so far found only about a dozen classes of unfair methods, this phrase is designed to give the Commission wide latitude in its power of consolidating complaints, to the end that one inquiry will present all the phases of a particular method.

Another very interesting question connected with the procedure of the Commission turns upon the question whether the complaint, having been determined upon and ordered by the Commission to issue in *its* name, which in turn is to be heard and decided by itself, affords to the defendant due process of law. No comparable example of the admixture of

executive and judicial power is to be found in our Federal jurisprudence.

The rules of the Commission provide that an answer to *its* complaint shall be made within thirty days after service. The size of the paper to be used is specified, or the answer may be printed in specified type.

Service of this complaint and of all orders and process of the Commission is to be by copy, either personally or by registered mail, and registry return is by the law made proof of such service.

Intervention is allowed both by law and the rules of the Commission. Such an application must be in writing and set forth the grounds therefor. This may be done either in person or by counsel.

At the hearings witnesses are examined orally, except that for good cause shown the deposition of witnesses may be taken.

The specifications of briefs are in general the customary form followed in appellate courts. They must be printed in specified sizes and type.

In connection with the subject of intervention an interesting question, as yet undetermined, arises. To what extent and under what circumstances may the law-enforcing officer of a state, say the attorney general or a district attorney, intervene in an inquiry being prosecuted by the Commission, looking to the discovery as to whether or not the Federal anti-trust laws are or have been violated? While, so far as I am informed, this question has not yet arisen, it seems quite likely that some enterprising attorney general will wish to raise it in behalf of the people of an entire commonwealth.

It will be noted on examination of the rules of the Commission that so far no provision has been made for the interposition of a demurrer against a complaint. Probably it is the view that, the Commission having written the complaint, it regards it as sufficient both in law and parties.

No provision is made for a docket of applications for complaints, nor will information be supplied or examination permitted of these applications. Members of the Commission have expressed the view that this course is necessary to protect small complainants against reprisals, and large institutions against uncalled-for attacks.

The real utility of the Commission will likely turn upon the speed and skill with which it considers and determines the contested questions put to it. It is apparent that it is not a tribunal with exclusive jurisdiction. The sections of the Clayton law which the Commission may administer are also capable of being invoked by the private litigant in his own way and at his own convenience. Being another forum, however, a forum in which the general government assumes the expense of witnesses, transcripts, etc., if active and prompt, it may afford distinct service to those whose means will not permit them to undertake the full expense of the litigation necessary to protect them from unfair practices and specific violations of the Clayton act by their stronger competitors. A judgment of the Commission would likely be very persuasive in efforts for additional relief in the ordinary judicial tribunals.

The judgments and orders of the Commission do not become binding, except when voluntarily acquiesced in, until the record and judgment have been reviewed by the circuit court of appeals, which court must give these cases precedence, when the judgment, if approved, becomes the court's judgment, and a violation thereof subject to the punitive processes of the court. Either the defendant or the Commission may invoke the aid of the court; the defendant to set aside the order of the Commission, or the Commission to enforce its order. Writ of error lies to the Supreme Court of the United States from the circuit court of appeals.

We have thus briefly sketched the course of a case before this newest Federal forum.

This law remains a potential force to be made use of by those whom it is designed to serve, and upon such parties and their counsel, by the manner and extent to which they call its provisions into active use, will largely depend whether or not it will perform a really useful and worth while service.

Nathan P. Williams

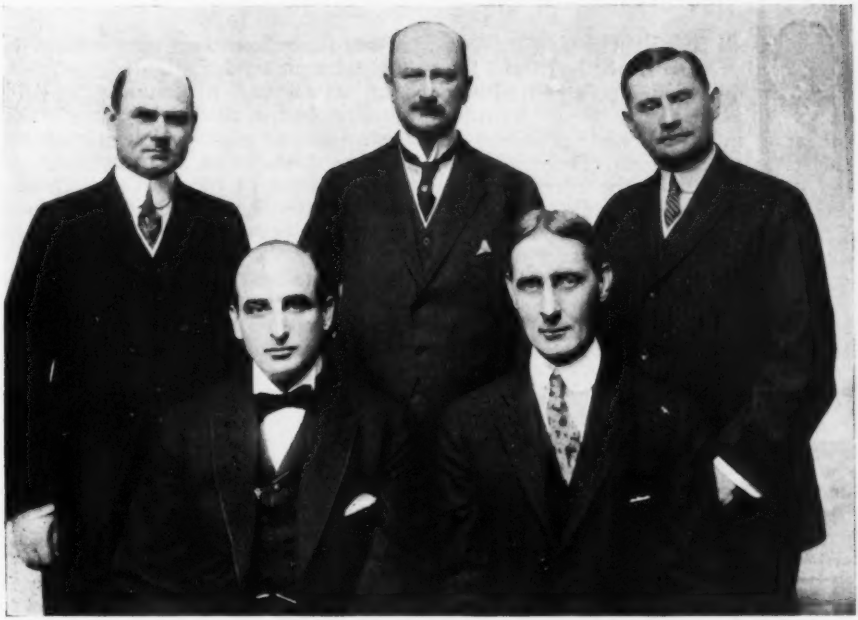
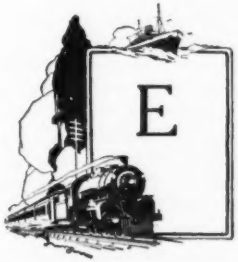


Photo by Clinedinst, Washington, D. C.

MEMBERS OF FEDERAL TRADE COMMISSION.
Standing, left to right, Commissioners Harris, Parry, Hurley.
Sitting, left to right, Commissioners Davies, Rublee.

The Federal Trade Commission Why and What It Is

BY HARVEY D. JACOB
Of the District of Columbia Bar



EXCLUSIVE of banks and railroads there are more than 300,000 corporations in the United States, many law-abiding, a few law-dodging. The stronger the corporate combination, the more effective its ability to weaken, and indeed destroy, all manner of competition. Long ago certain industrial concerns had become so large and so influential that it was difficult, well nigh impossible, for the smaller proprietors in the same line of development or trade to succeed. They therefore had to determine whether they would merge into the larger company upon its terms, or abandon their legitimate business, with its consequent loss of investment. All felt the injustice of the necessity, but none could suggest a remedy for this rapidly growing menace to the right of every man to pursue such lawful occupation as he might desire. To correct the obvious wrong the

states passed laws; but these laws, confined as they were to the territorial limits of the individual states, proved ineffective to reach the larger corporations operating in several and sometimes all the states of the Union. Thereupon, under the authority of the interstate commerce clause of the Federal Constitution, Congress enacted the Sherman law. This likewise proved both confusing and inadequate because of its general terms. Nevertheless, under its provisions many suits were instituted by the government, seeking to dissolve combinations in restraint of trade, and endeavoring to hold criminally responsible persons involved in conspiracies illegally to combine. Indeed, proceedings and prosecutions became so numerous, and their results so uncertain and conflicting, that the business of the country, both large and small, hardly knew what was expected of it in order to be within the law. Illustrative of this wide variance of legal opinion as to the real meaning of the law are the recent cases of the government against the International Harvester Co. 214 Fed. 987, and the Hamburg American S. S. Line, 216 Fed. 971, in each of which the trial court interpreted the prior decisions of the Supreme Court as meaning that only such restraints as were unreasonable were forbidden by the Sherman law. But in applying this "rule of reason" in the Harvester Case the circuit court of appeals for the seventh circuit practically eliminated the results, whether good or evil, flowing from the combination, and rested its decision upon the fact that the combination was illegal in the beginning (although it also found that the results of the combination were not evil), while in the Shipping Trust Case the district court for the southern district of New York applied this "rule of reason" in a directly contrary manner, ignoring any consideration of whether the combination in the beginning was legal or illegal, and basing its decision alone upon the result arising from it.

From this state of confusion and uncertainty there arose considerable agitation for legislative interpretation of the Sherman law; that its terms might be made more certain, and that business men might have means of knowing in advance whether they were within or without their legal rights.

In his message of January 20, 1914, the President, in addressing Congress on the subject of additional legislation regarding monopolies and restraints of trade, and urging the creation of a new administrative body in the general form of the present Federal Trade Commission, said:

"The business of the country awaits also, has long waited, and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing anti-trust law. Nothing hampers business like uncertainty. Nothing daunts and discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

"And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information, which can be supplied by an administrative body, an interstate trade commission.

"The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly, or in sort to assume control of business, as if the government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts, or the natural forces of correction outside the courts, are inadequate to adjust

the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

"Producing industries, for example, which have passed the point up to which combination may be consistent with the public interest and the freedom of trade, cannot always be dissected into their component units as readily as railroad companies or similar organizations can be. Their dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market, and bring upon it breakdown and confusion. There ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts, but also by independent suggestion, if necessary."

This message of the President, and the bill proposed for the creation of an interstate trade Commission, were scattered broadcast. The Chamber of Commerce of the United States called upon its constitutent commercial associations located in every section of the country for a referendum vote as to whether such a commission would be favored, and, if so, what form it should take. The result of this vote was overwhelmingly in favor of the establishment of the commission, and, generally speaking, the form of legislation proposed to create it was approved. Accordingly, with the country well advised as to just what functions such an administrative body was expected to perform, Congress passed the act creating the Federal Trade Commission, and on September 26, 1914, the President approved it.

That Congress had authority under the Federal Constitution to create such a commission is no longer an open question, since in the Brimson Case, 154 U. S. 447, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, the Supreme Court upheld the law establishing the Interstate Commerce Commission, indicating in its opinion the general scope of the constitutional authority by saying:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis for intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

Closely following the Federal Trade Commission act, Congress passed what is known as the Clayton law, which, in a manner, seeks to clear the commercial atmosphere of many of the conflicting opinions engendered by the Sherman law. A more detailed discussion of the provisions and requirements of these two acts appears elsewhere in this issue, and it would therefore serve no useful purpose to repeat it here. However, the editor has requested a conclusion as to the probable value and benefit to be expected from the creation of the Federal Trade Commission, and this necessitates the statement that the general purposes of the two laws appear to be the establishment of guides for business, the relieving of the uncertainty as to the true meaning of the Sherman act, such as might preclude a corporation from ever knowing whether it was within or without the law, *the prevention of the development of trusts,* and the assisting of the courts in dissolving corporations existing in violation of law. In other words, the whole theory of the laws seems to be that an ounce of prevention is worth a pound of cure.

In establishing by the Federal Trade Commission law the administrative machinery for the interpretation and enforcement of its enactments relating to the conduct of the nation's business, Congress took a long stride in the right di-

rection. Under the old order of things there was no law directed at monopoly in its incipiency. Therefore it was that corporations of all kinds rapidly broadened their activities, until their influence in the affairs of man was such that prices for commodities controlled by so-called trusts were no longer regulated by the law of supply and demand. The largeness of the supply of a particular article mattered not, since that supply was practically all under a single control. The Sherman law was directed at contracts, combinations, and conspiracies in "restraint of trade," and the Supreme Court, in the Standard Oil Co. Case, 221 U. S. 1, 63, 55 L. ed. 619, 646, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, 34 L.R.A. (N.S.) 834, held that:

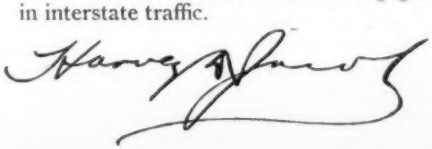
"The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of *restraint of trade* as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined *by the light of reason*, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute." (Italics ours.)

Therefore, until a corporation should become so large and influential that its conduct might be considered in "unreasonable restraint of trade" (and what kind of combination or what acts of the combination were to constitute an "unreasonable restraint of trade" are still sufficient grounds for great contrariety of opinion, as already illustrated by the Harvester and Shipping Trust cases), there was no Federal law by which it could be regulated or dissolved.

This situation occasioned all the uncertainty and doubt, commercial enterprises never knowing whether or not they were violating the Sherman law, and the government spending thousands of dollars investigating and prosecuting supposed and actual violations, with all the consequent embarrassment, retardation, and inconvenience to the organized business of the country.

But under the Federal Trade Commission and the Clayton laws this serious element of doubt is most likely to be eliminated. In most emphatic terms the Trade Commission law decrees "that unfair methods of competition in commerce are hereby declared unlawful." Thereby a new legislative standard is interposed, with the evident purpose of inhibiting in their inception those methods which, if allowed to continue uncontrolled, would produce the resultant evils the Sherman law was enacted to prevent; and thereby the business of the country can always know in the very beginning of things whether its contemplated conduct will be legal or illegal. The query naturally suggests itself as to how business interests are to learn all this? The answer is to be found in the fact that the law clothes the Commission with authority to investigate corporations engaged in interstate commerce, and also to determine whether particular persons, partnerships, or corporations have violated any of the laws. In these investigations, proceedings, and decisions will be laid down precedents for future guidance, much in the same manner as the Interstate Commerce Commission carries on its great work, rules and regulations upon which every honest business enterprise can work out its own salvation in its endeavor to be law-abiding.

Of course, the Federal Trade Commission is yet young, hardly organized, but undoubtedly it has far more and greater work to do than the Interstate Commerce Commission saw before it at the time of its creation. It, therefore, is reasonable to conclude that within a short time this new arm of Federal administration will be rendering the same immeasurable public service with regard to industrial corporations that the Interstate Commerce Commission does as to railroads engaged in interstate traffic.

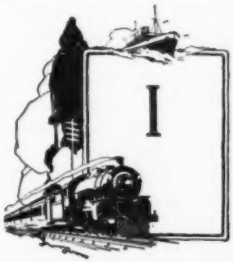


The Parcel Post Law

BY HON. DAVID J. LEWIS

Representative in Congress from Maryland

[Ed. Note.—Mr. Lewis prepared the House Parcel Post bill, containing the administrative clause referred to in his article. He has made careful and thorough study of the questions treated in his valuable contribution.]



IT WAS a great day for the people when the House was induced to repose in the Postmaster General and the Interstate Commerce Commission the following administrative power:

"If the Postmaster General find on experience that the classifications of articles mailable, as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability, or any of them, are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the revenue, he is hereby authorized, subject to the consent of the Interstate Commerce Commission after investigation, to reform from time to time such classifications, weight limit, rates, zone or zones, or conditions (of mailability), or either, in order to promote the service to the public or to insure the receipt of revenue adequate to pay the cost thereof."

The whole parcel post service is now conducted in virtue of orders passed under this clause. The present rates, the weight limit, the size limit, the carriage of books, the C. O. D., and the insurance service-rates, have all been thus administratively made; and the capacity of the parcel post to serve the public is owing to the wise recognition by Congress that transportation methods call for administrative, and not legislative, treatment. But for this recognition the rate for a 10-pound parcel would now be 42 cents for 150 miles, or four times the cost of service, instead of the 14 cents now charged. Such a parcel post would have been a mere mockery, of course. And the weight limit,—if the turkey weighed 11½ pounds, instead of 11, the former could not have shipped it from the farm at all. This freedom of the institution to develop by administrative adjustments is but the same right enjoyed by the express companies and the railways, subject to the Interstate Commerce Commission, to adapt their rates and facilities to the requirements of the potential traffic. The following table gives, between the points named, the rates by express, the present parcel post, and the statutory parcel-post rates, that would have obtained if the parcel post institution had not been reconstructed under the administrative clause:

Rates from Baltimore—	1 lb.	5 lbs.	10 lbs.	15 lbs.	20 lbs
To Philadelphia:					
By parcel post, now	$0.05	$0.09	$0.14	$0.19	$0.24
By parcel post, statutory rate	.06	.22	.42	...	...
By express	.26	.27	.30	.32	.35
To Richmond:					
By parcel post, now	.05	.09	.14	.19	.24
By parcel post, statutory rate	.06	.22	.42	...	...
By express	.26	.29	.34	.38	.43
To New York:					
By parcel post, now	.05	.09	.14	.19	.24
By parcel post, statutory rate	.06	.22	.42	...	...
By express	.26	.29	.32	.36	.40

It may interest the student of institutional subjects to recall the fact that the distinction between the legislative and administrative function is much better recognized abroad than it is here. On the Continent, while the lawmaking function does legislate in detail as to the private relations of individuals, on public subjects, only the principle is legislatively declared, and the details are left to the administrative authorities to work out in the form of regulations. Special administrative courts even are provided to adjust controversies thus arising,—courts wholly distinct from the private-law tribunals.

What the individual cannot satisfactorily do for himself he must have done for him through some form of organization. Shall it be a private, or, as in this case, the postal organization? He will answer this question by asking two others: Which is the most efficient? Which is the most economical? Now, what is it that the private express (our *de facto* parcel post) carriers do? They carry the parcel over 250,000 miles of railways. But the postal system carries it over the same railways, and over more than a million miles of rural routes besides. Postal efficiency does not end even there. Each system is federated with all other postal systems, rendering an international service, reaching every town and village on the planet. A universal, a truly incomparable service, as against a merely urban and sea service by the express company.

In 1912 the express companies had an exclusive right to handle the potential package traffic. How much of it did they handle? Their reports give the figures as 317,000,000 packages, about 3 *per capita*. In 1915 the parcel post handled 400,000,000 pieces, or about 4 *per capita*, counting only the parcels of 1 pound and upward as representing the new parcel traffic. In the same year the companies handled 282,000,000 pieces, about 3 *per capita*, which, combined with the postal traffic, makes about 7 parcels *per capita* for 1915. The Swiss parcel post moves 10 parcels *per capita*. The combined express and postal traffic here in 1915 shows about 7 *per capita*, of which the express companies, in exclusive possession of the field in 1912, were able only to move 3; the other ⅘ of the potential traffic being killed by their high rates and failure to reach the farm and country districts. And the half of the potential traffic which they were economically unable to move, the parcel post is now moving, and at a profit of about 25 per cent of the parcel rates. "Efficiency!" For forty years the people were denied this service because it was falsely asserted that the Postoffice was not efficient enough to do this work of the express companies. Now we find that the express companies were killing more traffic than they carried; were performing only about half the function,—and, call the statement demagogic if you will,—it is true that the traffic they failed to carry was the common man's traffic. It was traffic that could pay 14 cents per package to the postal system, but could not pay the companies 50 cents; not to speak of the postal rural service rendered daily on more than a million miles of routes.

Now, how about the economy of these transportation rivals? This a point of the greatest importance. The express companies lost over $2,000,000, they say, on the 1915 traffic, and recently secured, on this ground, an advance of their rates from the Interstate Commerce Commission. Their statement shows that they secured 48 cents for the average piece, and that it costs them 24 cents each to handle it. It cost the postal system less than 5 cents each to handle its most expensive parcel, the one of 3 pounds and more in weight, that required the aid of vehicle delivery. Six censuses of the parcel post traffic have been taken, for a half month in April and October of each year, and they show a progressive decline of the expense of vehicle delivery from 39 mills to 28 mills per parcel, and this while the costs to the companies have been going up.

If the cost, 2 cents a parcel for "pick-up" and 2 cents more for collection of the rate from the consignee (services the companies give, but the Postal Department has not yet given), be added, it appears that the Postoffice could handle its package (giving all the facilities granted by the companies) at 9 cents, and the

heavier express package at 12 cents, against the 24 cents which it costs the companies. The experience shows that if the Postoffice were given the express traffic it could make a profit of some 30 millions a year out of the express business while paying the railways what they now receive of the companies.

But does the parcel post pay? Yes; about 25 per cent on the average, and the larger the package the greater the profit. The parcel that calls for wagon delivery weighs an average of 5½ pounds. It costs less than 5 cents for all postal processes and 6 cents for railway pay,—11 cents in all. The postal system receives for it 18 cents, leaving 7 cents profit.

Efficiency; economy; it is hardly necessary to say more. The parcel post has given us proof of incomparable excellence in both. It has cut the operation cost per parcel to less than half by express, it reaches the twenty-five million rural population, and has more than doubled the package traffic. We have had enough experience with it now to satisfy the most timid man that the administrative clause is a power very wisely placed as judged by the result, and that the Postmaster General and the Interstate Commerce Commission ought to exercise that power to cover the whole parcel-post function of transportation, as abroad, and give the farm, where private express service cannot reach, an equal right to transportation in small shipments. That means, at least, a weight limit of 100 pounds. It means also a size limit, say, of 2 feet square. And it means, besides, the collecting of the rate on delivery, and that, as the President proposed in his inaugural address, "the United States should be given a parcel post equal to that of any other country in the world." Now, the weight limit in all these other countries, except England, runs from 100 to 132 pounds.

Photo by The Towles Studio

HON. DAVID J. LEWIS

Proposals

The fullest study of the subject warrants me in proposing the following improvements:

Weight Limit: One hundred pounds.

Size Limit: Eighty-four inches, measuring the length and half the girth combined.

Pick-up: When postage on shipment is not less 15 cents.

Insurance: Graduation of insurance rates from 3 cents minimum to 15 cents for $100.

Collect: Privilege on collect-on-rate from consignee when postage is not less than 21 cents, minimum fee, 4 cents; the consignor to guarantee postage. Farm products direct from farm, no extra charge.

Classification: Parcels of first-class mail in single bundles directed to noncity-delivery offices may be sent if bearing "drop-letter" postage plus parcel rate. Any statement relating to contents of parcel may be enclosed within the parcel. Any mail piece exceeding 4 ounces in weight and marked "fourth class" or "parcel" may be posted at parcel rates.

Zones: The zones shall each be 50 miles in extent and be based on the present units.

Rates: The present rates unchanged when postage is not over 15 cents, ex-

cept farm products, then when not over 5 cents. Above 15 cents postage, first 50 miles, ½ cent per pound, plus 10 cents; except farm products, plus 4 cents; each additional 50 miles, 5 pounds for a cent. No rate to exceed 12 cents per pound, and actual rail distances to be taken up to 300 miles.

An attack, made mostly by the poorly informed or the interested, suggests that our postal system is run at a deficit. This ignores the fact that 29 per cent of the total postal services are performed in the carriage and handling of second-class matter, and 24 per cent of this for nothing, together with 2 per cent more for government mails, 26 per cent in all. This service—over $50,000,000 annually—represents a pure gift by the people to the cause of education and the dissemination of knowledge. It amounts to about the same proportion in postal operations as the passenger traffic in railway operations. Suppose the people who ride on the railways had the government compel the railways to carry all their passengers for nothing, could they then be heard to condemn the railways for mal-economy, or inefficiency in failing to pay interest and dividends? "Ingratitude, thou marble-hearted friend!" That is what some of the beneficiaries of this $50.000,000 postal subsidy are doing.

The objections to parcel post have, like the Arab, silently folded their tents and stolen away. This was inevitable. Bad transportation, or no transportation, could not truly be an advantage to any class of people, and good transportation could not injure them. The country merchant, of whose situation so much was attempted to be made, experience has converted, I have found, into a grateful friend of the service. He uses it more than anyone else—to fill in special orders for his customers, in stock he could not profitably carry. He serves a community of four or five hundred persons. Their personal needs are as numerous in kind as a community of a hundred thousand. He would have to carry a stock of $100,000 to meet all such needs,—a stock the community could not meet the insurance on, much less the interest, depreciation and taxes. While he cannot carry such a stock, he can, through the parcel post, couple up with a million-dollar stock, the supply-house in the cities, a day or two days late; and thus meet the unusual demands of his customers by special orders—"mice" transactions, the wholesalers now call these orders; and the only objection I have heard to the parcel post came from a wholesale shoe dealer who was wroth because of the bookkeeping and bother these "mice" orders from the country dealers gave him.

The postal system is a five-fingered institution in all other countries, being free to use the three methods of communication, the letter, the telegram, and the telephone communication, as well as the parcel and savings-bank function. Two of its fingers are denied it here; the telephone and telegraph, both conducted postally and on the very same wire abroad. It had been hoped that the city housewife, who pays from two to five times the price the farmer receives for table necessaries, would be able to secure them direct from the farm by parcel post at their first price,—and bearing their first smell! And she could do so, through the telephone, if the rates permitted. Washington is entirely surrounded by farms, but the housewife cannot reach a farm, but at toll rates of 15 to 40 cents,—which are prohibitive for these small retail transactions.

Before the parcel post we had the highest parcel rates. Now they are among the lowest in the world. But we still have the highest telegraph rates, from 25 cents to $1 for the minimum message. Where the post conducts the telegraph they run from 10 to 24 cents for longest distances. Here are averages for Europe and the United States:

Distance in miles	150	250	700	3,000
Europe, average	12c	12c	12c	24c
United States	25c	30c	50c	$1.00

The result of our high rates is that we use the telegraph but little. New Zealand, with a 12-cent rate, shows 9 telegrams *per capita*, the United States only 1. And yet with the lowest letter rates we show the highest use, 101 letters *per capita*, as against 93 for New Zealand.

While our telegraph rates run from two to over four times as high as in countries like Australia, with distances

as long and wages as high as our own, our toll or long-distance telephone rates are even more immoderate. They run from three to seven times as high as the postal telephone rates of other countries. Here is a statement of the average rates for nine countries on the Continent of Europe:

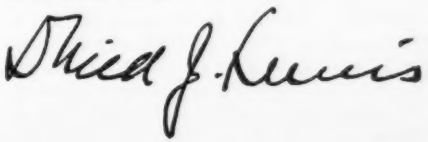
Distance in miles	100	300	400	500	700
Continental rate	20c	37c	39c	46c	53c
Bell rate	60c	$1.80	$2.40	$3.00	$4.20

That is, for 100 miles we pay three time, for 300 miles five time, for 400 miles six times, and for 700 miles eight time the rate on the Continent of Europe, for a three-minute conversation. It costs the American as much to ship his long-distance conversation over the wires, mile for mile, as it costs him to ship a ton of freight on the rails. The railroads get, on the average, 7 mills a mile for moving a ton of freight. The Bell system charges 6 mills a mile for carrying the three-minute communication. Readers can realize how weighty their conversations sometimes are. They weigh about a ton on the long-distance wires.

What is the consequence of our high rates? To reduce the traffic to a point as abnormally low as the rates are high. Combining the telegrams and long-distance messages, we find that other countries use the wire from two to four times as often as we. While Denmark shows 17 such messages *per capita* and New Zealand 12, we show only 3. While we rank first in the use of the letter, we stand but 13th in the combined use of telegrams and long-distance telephone messages. Moreover, our companies maintain but one telegraph office to seven postoffices. These postal institutions maintain an average of two telegraph offices to every three postoffices.

A rate, for cities and country, of a cent a call for the local service, and an additional cent for each additional 10 miles of distance, can be realized here through the postalization of the telephone, using the same wires for the telegram and telephone message, as is done everywhere else. All our other postal rates are as low now, and all of them except the second class yield a profit.

"How can the Postoffice do these things so much more cheaply than the private functionaries?" you ask. I can only answer here in the briefest manner. To begin with, it has a genius for doing small things cheaply. It costs the express company at least 10 cents per parcel for accounting and tagging, labors all replaced by merely affixing the postage stamp to the postal express shipment. This wonderful stamp is the accountant of 300 millions of postal revenue this year, and is handling 20 billion pieces of mail. The application of express company methods to these mail pieces would be grotesque, and probably would cost nearly as much as the operations of our railways. The postage stamp on the telegram abroad replaces about 50 clerical processes with the private telegram here —and our telegram here costs the companies 48 cents, as against 27 cents in Australia. In the field of the electrical communication the foreign postal systems use the one wire for both telephone and telegraph messages, sending both at the same time. Hence, they have but one system of pole lines and wires to maintain. Here we have the Western Union, with 200,000 miles of pole line; the Postal, with 130,000, and the splendid Bell long-distance system, a better telegraph system than either, which is not carrying telegrams publicly, at all. Three private bills of maintenance, and but one for the Postoffice. The postal systems are also utilizing the automatic telephone, by which the exchange operators, half the personnel, are dispensed with. Altogether, with only one third the pole lines to maintain, with one third the interest to pay, and about half the personnel to employ, and the co-ordination of the whole with a postal *régimé* already in operation, it is not extravagant to claim that we can realize postal telegraph and telephone rates as low as in other countries, as we now do with our letter and the parcel rates.

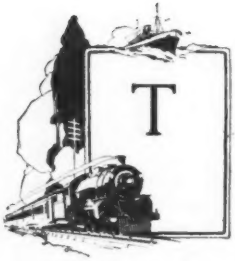


Our New Economic Opportunity

Something of the Marvelous Growth of the Chamber of Commerce of the United States

BY ROBERT D. HEINL

Associate Editor, The Nation's Business



THE great struggle in Europe has fairly thrust us as a nation into the very forepart of a new economic era. Never before have American business and American business men realized as they now realize the value of common understanding, co-operation, the diffusion of information about industrial and trade conditions, and the necessity for intelligent promotion on fair and nonpartisan lines. As if it had been provided especially for such a world emergency as this, the Chamber of Commerce of the United States is performing service of far greater importance than its builders ever thought of. The Fourth Annual Meeting in Washington recently was possibly the greatest business gathering ever held in this country. Three hundred thousand members of 700 commercial bodies not only representing every state in the Union, but Alaska, Porto Rico, Hawaii, and the Philippines, sent delegates.

This is all the more remarkable in view of the fact that the National Chamber was organized but four years ago. The organization has grown until to-day every principal local and national trade affiliation is represented. In addition, there is included in the membership American Chambers of Commerce in Berlin, Paris, Milan, and Constantinople. The latest of foreign organizations to be elected to membership in the National Chamber are in Rio de Janerio and Shanghai.

Mr. Taft's Tribute.

Nonpartisanship has been the keynote. It had the unqualified approval of Mr. Taft, who presided over the meeting at which it was organized, and his successor, Mr. Wilson. President Taft said:

"What is the purpose of this organization? It has come on at a time when the opportunities for making an organization like this seem to me to be especially useful. I have been surprised in going about the country to find that there is no town and no village so small that it does not have either a Board of Trade or a Chamber of Commerce. . . . Now, there is not any reason why those organizations should not be units that go to make up, together with the larger organizations of larger towns and cities, where there is real trade and real commerce, the constituency of this great organization; and I speak of the movement for the purpose of showing the power that this national organization has, by the referendum to all these organizations, to gather from them the best public opinion that there is, in order to influence the legislation of the country, so far as that may be properly influenced."

Praise from President Wilson.

In Washington last month President Wilson said:

"I have followed with a great deal of interest the work of this association, and my interest has been chiefly due to the fact to which I called your attention a year ago. You are beginning to know the other parts of the country just as well as you know your own part of it; and, better than that, you are beginning

to know what the other parts of the country think, as well as what your part of the country thinks. And it will often happen, I dare say, that you will find that other parts of the country have an idea or two. . . . And very few instrumentalities are, or will be, more serviceable than yours in this digestion and comparison of views, this frank assessment of the opinion of the business men, at least, of the country, with regard to all the great matters of public policy. I congratulate the country upon having such an instrumentality, and I think your own committees will testify that they have a broader conception of what this association can do than they had before, and that they have this as their leading conception, that the life of this country does not reside even chiefly in any center of population of the United States." The rapid rise of the National Chamber is due to its democratic structure and control, and to the representative character of its support. The smallest organization admitted to membership has one delegate and one vote, the largest and most influential, only ten delegates and ten votes. A forty-five day referendum and a two-thirds vote are required to commit the National Chamber. By its national character, democratic constitution, open methods, intelligent conduct, and unstinted application to current business problems, the Chamber has won the confidence and respect of the congressional leaders of all parties, and most positive co-operation from all departmental heads at Washington.

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R. G. RHETT
President of the U. S. Chamber of Commerce

What Business Men Have Voted For.

During the past four years the National Chamber, obedient to its referenda, has favored, among other things, the adoption of a national budget and a permanent tariff commission. It has suggested and obtained seven vital amendments to the Federal reserve act, and has suggested and obtained the adoption of the Federal Advisory Council to assist the Federal Reserve Board. The National Chamber has influenced exceedingly important modifications that appear in the final forms of the trust bills. In the matter of the upbuilding of an American merchant marine, the Chamber of Commerce of the United States is on record as in favor of government subsidies, under certain conditions, as in favor of government subventions to mail and freight lines under the American flag, of the creation of a Federal shipping board with power, of the amendment of the Ocean mail law of 1891, of legislation abolishing deferred rebates, and of Federal licenses for all shipping, and as against the government purchasing, constructing, chartering, or operating vessels for mercantile purposes, and against government ownership with operation by private owners.

Relative to the Bureau of Foreign and Domestic Commerce and the Consular Service, the National Chamber advo-

cated, in a referendum, further improvements in these government services to business men, including increases in staff and appropriations, the creation of the new position of trade commissioner as distinguished from commercial attaché the Americanization and improvement of the Consular Service, and the renewal of the publication of statistics of internal commerce. The National Chamber recently indorsed, through the results of a referendum, the establishment of an international court for the settlement of disputes between nations by established rules, and the creation of a Council of Conciliation for the settlement of questions which do not depend upon established rules. It approves also bringing economic pressure to bear upon nations resorting to military measures without submitting their differences to either of these tribunals.

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ELLIOT H. GOODWIN
Secretary of the U. S. Chamber of Commerce

The suspension of certain provisions of the much-discussed seamen's act was recommended by a special committee of the National Chamber. As a result of this action a referendum has been sent out, giving the important commercial bodies of the country an opportunity to vote on the report. Up to this time discussion has largely centered in coastwise cities, but now the question of the advisability of revising the seamen's act will be taken into every state in the Union.

New President for the National Chamber.

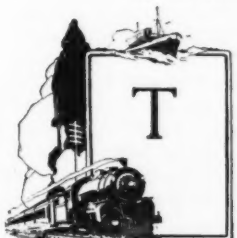
R. G. Rhett, a prominent lawyer and banker of Charleston, South Carolina, has just been elected president of the National Chamber. Mr. Rhett is the president of the People's National bank at Charleston. He was born at Columbia, South Carolina, and is fifty-four years old. He attended the Porter Academy at Charleston, and later the Episcopal High School of Virginia. He was graduated later from the University of Virginia. He practised law for fifteen years, and then became president of the South Carolina Loan & Trust Company. Mr. Rhett has been a figure in the commercial history of Charleston, and has been an active member in the local Chamber of Commerce. Mr. Rhett for eight years was the mayor of that city. "Finally, and to show how other countries have gone ahead of us, thereby conclusively proving the urgent need of a National Chamber of Commerce, it may be said that for half a century the Deutsche Handelstag, a union of all the chambers of commerce of Germany, has existed. Federal commercial associations have existed in France, Austria, Italy, and Switzerland nearly as long. In Great Britain are two large national commercial bodies, the Imperial Council of Commerce and the British Association of Chambers of Commerce. They furnish a means to make the voice of business articulate in those countries.

Robert D. Heinl

*Interferences With American Trade Abroad**

BY HON. THOMAS J. WALSH

Of the Helena (Mont.) Bar; Senator in Congress from Montana



THE distinction between seizure of a ship for carrying contraband and for running a blockade is perfectly plain. A seizure of contraband can be made because it is such only when it is going into the enemy country, either directly or indirectly. A ship is liable to capture and to confiscation with her cargo for attempting either to enter or to depart from a blockaded port, which must of necessity be an enemy port.

Applying these principles, as to which there was no room for controversy between this country and Great Britain when the present war began, if, indeed, they were not acknowledged by all maritime nations, to the problems that confront us, and it follows that the allies may seize contraband on the high seas consigned to a port of Holland, for instance, but in reality destined for Germany; and that, conceding a blockade of German ports to be maintained, they may (1) capture and confiscate any vessel attempting either to enter or depart from any such port, together with their cargoes of whatever character they may be; and (2) seize any vessel carrying goods to a neutral port, and confiscate such part of her cargo as can be shown to be destined for Germany, to which it is to be carried by sea through a blockaded port; in other words, goods destined for Germany, that must run the blockade in order to enter that country, are subject to confiscation. But a vessel issuing from a port of Holland *en route* to America is not subject to molestation, whatever may be the character of her cargo. England cannot blockade the ports of Holland while she remains at peace with that nation, as she may those of Germany, with which country she is at war. So far as any obstacle has been placed by the allies upon the passage of dye-stuffs, sugar-beet seed, potash, or any goods of German origin, through the ports of Holland to this country, the interference has been lawless and in contempt of the neutral nations affected,—that nation from whose port the vessel detained sailed, the nation whose flag she bore, and the nation to which the goods she carried were bound.

So noncontraband goods that need pass no blockade in order to enter Germany, consigned to a neutral port from which they are to proceed overland to the enemy country, cannot, except in defiance of international law, be held. If there are any articles of commerce passing in trade from this country to Germany not on the contraband lists of the allies, their detention *en route* is equally lawless.

United States Never Blockaded Neutral Ports.

I recur to the wholly baseless suggestion that the United States is complaining of rules of naval warfare which it developed in the Civil War.

President Lincoln's proclamation of April 19, 1861, declared the intention of the government "to set on foot a blockade of the ports," not of any neutral state, but of "the states aforesaid,"

* From recent address before the Senate of the United States.

which, as recited in the proclamation, were the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. Subsequently, by a proclamation dated April 27, 1861, the blockade was extended to the states of Virginia and North Carolina, which proclamation asserted that "an efficient blockade of the ports of those states will also be established."

Foreign governments were advised "that it was intended to blockade the whole coast from the Chesapeake bay to the Rio Grande." The question presented in the case of The Peterhoff, 5 Wall. 28, 18 L. ed. 564, was whether the blockade extended to the entire mouth of the River Rio Grande, forbidding access to the Mexican port of Matamoros, situated on the right bank of that river opposite Brownsville, in the state of Texas. No such audacious pretension as the assertion of a right to blockade the ports of Mexico generally in order to intercept trade overland between them and the States of the Confederacy was ever made by anyone speaking for the United States. When the so-called Matamoros cases, including the one specifically referred to, came before the Supreme Court, it was claimed, among other reasons advanced in justification of the captures, that the blockade embraced not all the ports of Mexico, but that of Matamoros only, because of its situation with reference to the boundary stream. The court in its opinion entered upon an inquiry, to which it was led in view of the contention to which reference has been made, of the right of a belligerent to blockade the mouth of such a stream; and, after reviewing cases on which some reliance was placed, asserted:

"It is sufficient to say that none of them support the doctrine that a belligerent can blockade the mouth of a river occupied on one bank by neutrals with complete rights of navigation."

The court took some pride, doubtless, in being able to add:

"We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel states, and that neutral commerce with Matamoros, except in contraband, was entirely free."

No English writer on international law pretends that this government ever sought to interdict innocent trade through Mexican or other neutral ports as a means of overcoming the Confederacy.

Hall's International Law says: "During the Civil War the courts of the United States conceded that trade to Matamoros, on the Mexican shore of the Rio Grande, was perfectly lawful."

And Oppenheim, a modern English writer of the very highest authority, in his compendious treatise on international law, refers to the subject in the following language "When, in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser Vanderbilt captured the vessel Peterhoff, destined for Matamoros, on the Mexican shore of the Rio Grande, the American courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited."

The proclamation of President Lincoln under which the blockade of the southern ports was inaugurated speaks for itself, and refutes the claim that any Mexican or other neutral ports were within its terms. If it was to any extent ambiguous as to the port of Matamoros, the Supreme Court had no difficulty in arriving at the conclusion that there was no purpose on the part of the military branch of the Government to violate the established principles of international law by attempting to make it effective to restrain innocent commerce with that port. The contention made in that behalf was rejected by the court, not only upon the plain language of the proclamation, but upon a consideration of the authorities, which denied to a belligerent the right to blockade the mouth of a stream which formed the common boundary between the country of its enemy and that of a neutral. The court declared laconically that "Matamoros was not and could not be blockaded."

Blockade of Neutral Ports Forbidden by Law of Nations.

The principle announced had universal acquiescence from the powers participating in the Naval Conference of 1909, and was expressed tersely in the once celebrated but now contemned London Dec-

laration, as follows: "Article 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy."

The report of the drafting committee has the following comment on this article: "Blockade, as an operation of war, can be directed by a belligerent only against his adversary. This very simple rule is laid down at the start, but its full scope is apparent only when it is read in connection with article 18."

The article referred to is as follows:

"The blockading forces must not bar access to neutral ports or coasts."

Concerning it the report mentioned says:

"This rule has been thought necessary the better to protect the commercial interests of neutral countries. It completes article 1, according to which a blockade must not extend beyond the ports and coasts of the enemy, which implies that, as it is an operation of war, it must not be directed against a neutral port, in spite of the importance to a belligerent of the part played by that neutral port in supplying his adversary."

These axiomatic declarations of the Conference express in slightly different language the rule on the subject as it was presented by Great Britain in her formal memorandum presented to the assembly. It will be recalled that Sir Edward Grey, in his invitation to the Powers, suggested that they "interchange memoranda setting out concisely what they regard as the correct rule of international law" on the points to be considered at the conference.

The subject of "blockade," in the memorandum submitted by him on behalf of the British government, was introduced by the following proposition:

"1. A blockade is an act of war carried on by the warships of a belligerent detailed to prevent access to or departure from a defined part of the enemy's coast."

Not the coast of a neutral, but an enemy's coast.

It has been advanced in this connection that, though the Supreme Court eventually held that the blockade could not be legitimately extended to include Matamoros, the decision did not come until after the war was over, and that meanwhile our naval forces seized all vessels trading to that port upon the assumption that it was in a state of blockade. In other words, it is offered that our Navy during the Civil War ruthlessly disregarded the rights of a friendly neighboring power by blockading its ports, and that we ought not now to complain because of like conduct on the part of the allies through which our trade is injuriously affected. Bad as that logic is, the assumed facts upon which it rests are wanting.

The capture of the Peterhoff was made and was justified by the court because the ship was carrying contraband as a part of her cargo destined to Texas. It was submitted to the court whether for this offense the ship, too, should not be condemned. The court held that the captors having found contraband aboard, it was their duty to bring the ship in for adjudication, and accordingly costs were awarded against her, a burden the court felt the less hesitancy about imposing in view of the fact that her captain had, in anticipation of capture, thrown overboard a package believed to contain incriminating papers. The search of the boarding officers having revealed the contraband articles, the vessel was brought before the prize court. It would have been quite unnecessary to examine into the character of her cargo if she was subject, in the opinion of the naval commander who overhauled her, or under any instructions issued to him by his government, to seizure because her port of destination, Matamoros, was in a state of blockade. In such a case he would have taken her, whatever the nature of her cargo. I repeat, the Peterhoff was captured because she was carrying contraband, not because she was attempting to run a blockade to reach the port of Matamoros. It was the duty of counsel to place before the court every consideration of law or fact that, in his judgment, might uphold the seizure and secure the most comprehensive adjudication of condemnation. He advanced that Matamoros was a blockaded port; that was rejected. He advanced that the real destination of the ship was Brownsville,—that, in fact, her cargo was to go to that port by lighters, and

not to Matamoros; that was rejected. He advanced that the noncontraband part of her cargo was to go overland from Matamoros to some point in Texas, and therefore should be confiscated; that was rejected.

Trade with Enemy Country through Neutral Ports, Except in Contraband, not Subject to Interruption.

This leads to the consideration of a feature of the case of transcendent importance at the present juncture. Perhaps no incident of the war has more profoundly stirred the human heart or aroused a keener sense of man's inhumanity to man than the refusal of the allies to allow milk to be introduced into Germany through the ports of Holland for the sustenance of the babes of the countries in arms against them.

Of the legitimacy of efforts to starve the noncombatants of an enemy country in order to drive the authorities into submission or to sue for peace, it is useless to inquire. The reduction of beleagured cities by famine rather than by assault is a method of warfare that may claim the sanction of great age, at least. It is open to suspicious minds, too, to speculate upon whether it can be that the dairy industry of Germany is in such a state of paralysis that milk cannot be supplied to meet the requirements of starving babies.

No matter. By what right is anyone in this country forbidden to send milk, if he chooses to do so, to Germany overland through Holland? Milk has not yet been included in any lists of contraband. It would be absurd that it should be, but not much more so than that many of the articles so classified are found in them. Rubber gloves for nurses may be excluded because the material of which they are made is classified as contraband, but milk thus far has been regarded as innocuous as an instrument or equipment of war.

In the Peterhoff Case the court found it settled by an unbroken line of English authorities that noncontraband goods destined to a neutral port from which they were to be transshipped by land to the enemy country were not subject to seizure as prize, and, having given its assent to the doctrine they announced, declared:

"We must say, therefore, that trade between London and Matamoros, even with intent to supply from Matamoros goods to Texas, violated no blockade, and cannot be declared unlawful."

And this declaration was followed by the following announcement of the principles and the duty of the court in the premises:

"Trade with a neutral port in immediate proximity to the territory of one belligerent is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly, and very seriously impairs, the value of a blockade of the enemy's coast. But in cases such as that now in judgment we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence."

In this the court but paraphrased the language used by Sir William Scott in 1801, in the case of The Stert, 4 C. Rob. 65. Holland being blockaded, goods were sent from Edam, near Amsterdam, by inland transportation to Emden, in Hanover, a neighboring state, with which England was at peace, and were captured on the sea *en route* to London. He released the goods, though it was advanced that if such trade were permitted it would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland; but he observed: "If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit a remedy of this species. The court cannot, on that ground, take upon itself to say that a legal blockade exists where no actual blockade can be applied."

Sir William Scott, afterwards Lord Stowell, before whom most of the prize cases originating during the earlier Napoleonic wars were heard, is justly esteemed at home and abroad as one of

the greatest expositors of the law of prize of any age or nation.

He applied the principle to the case of goods going overland from Amsterdam to Rotterdam when, for reasons satisfactory to its government, his country had blockaded the former port, but had not proclaimed a blockade of the latter. These were cases of goods proceeding from a blockaded port to a neutral port for transshipment. He enforced the same principle in the case of goods proceeding from a neutral port to a neutral port for transport by land to the enemy country. In that case the goods were shipped from London to Emden for transshipment to Amsterdam, when Holland was under blockade.

Sir Robert Phillmore, who attained a high reputation as a practitioner in prize cases in England, and afterwards became a judge of the High Court of Admiralty and a member of the Privy Council, in his Commentaries upon International Law, expresses the rule of these cases in this brief sentence: "Trade of a neutral to or from a blockaded country by inland navigation or transportation is lawful."

He supports this statement by reference to the Peterhoff Case, "in which," he says, "the law is well summed up."

Two principles, concerning which none ventured to cavil even before this war began, may be thus stated:

First. Neutral ports cannot be blockaded, from which it follows that goods issuing from them, whatever their character, not destined directly or indirectly to the enemy country, cannot be interfered with by a belligerent.

Second. Noncontraband goods may freely enter neutral ports, though destined for the enemy country by inland transportation, notwithstanding a blockade.

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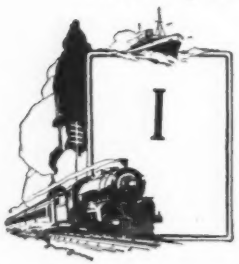
THE STAMP OF PROTECTION.

The American flag painted on a case of goods shipped from Holland to Philadelphia.

*The Malady of the Railways**

BY HOWARD ELLIOTT

President of the New York, New Haven, & Hartford Railroad Company



IN SPITE of errors made in the work of creating the United States railways, they stand to-day as the greatest evidence of constructive work in the world, and even with their early faults and present failures they are the wonder of the world as to their constructive cost, their total service to the public, their high wages, and their low rates.

Mr. E. E. Clark, one of the Interstate Commerce Commissioners, said in a speech a few years ago:

"Even if it be true that the present financial condition of transportation agencies is due to reckless, improvident, or even dishonest financing in the past, it would be a mistake to undertake to correct it by a policy of reprisal which will impair the usefulness or efficiency of the carriers upon which the welfare—the very life—of the commerce of the country depends. That commerce grows continually, and we have seen, each year, periods during which the available facilities were sadly lacking in capacity and efficiency to properly furnish the transportation demanded.

"This is in part due to the failure of carriers to provide themselves with facilities, in part to inefficient handling, and movement of equipment, in part to failure of shippers and receivers to provide room and facilities of their own sufficient for their needs, and in part to customs that have grown up in some lines of business that necessarily cause serious delay to cars and congestion of terminals. Of course, the ideal situation would be one in which the carriers were ready to provide all the equipment needed, and promptly transport all the traffic offered, at the time of the maximum demand, but that situation can be attained only by large additions to the facilities and great improvement in methods. The added facilities can be secured only through expenditures from surplus earnings or from expansion of credit. In either way the total cost to purchasers of transportation would be increased. It seems to me that no more helpful work can be done than to bring about the highest possible degree of efficiency in the operation and utilization of the facilities now possessed."

Accepting all of the Commissioner's criticisms as to the past, it is the present and the future which confront us. Let the dead past be buried. The country must go on. The railways must be prepared to serve an ever-increasing population.

Less Mileage Constructed.

Whatever the reasons for the present Malady of the Railways, two facts stand out prominently in the history of the railways of the United States for the year 1915. One is that less mileage was built in that year than in any year since 1864. There have only been three years since 1848 when there was a smaller mileage of new railway constructed than in 1915. The other fact has to do with the amount of railway mileage in the hands of receivers in 1915. With only one exception, 1893, was the mileage that entered into the hands of receivers larger than last year; and 1893 was a panic year.

Millions Interested in Railways.

Let me call to your attention the millions of people directly interested in the railways. Railways do not belong to a few rich men or bankers. They are not the personal property of the officials. The directors do not own them,—directors are the trustees and servants of stockholders.

There are at least 1,500,000 owners of the securities of these American rail-

*From Address to the Chamber of Commerce of the United States of America on February 8, 1916.

ways. It is fair to assume that dependent upon these owners are four other persons, and in that case this would mean 6,000,000 people.

There are 1,800,000 men, approximately, employed in the railway service, and if you allow five persons to be depending upon each, that would mean 9,000,000. There are at least 1,000,000 workers in industrial plants directly dependent upon railway operation,—such as coal mines, rail mills, car shops, and so on. They represent another 5,000,000 people.

Thus you have about 20,000,000 people, out of a total population of 100,000,000, who depend very largely for their daily bread and butter upon having this great piece of transportation machinery prosperous. But there are a great many others who are interested. The insurance companies have $1,500,000,000 invested in railway securities, representing 30,000,000 policy holders; the savings banks of the country have $800,000,000 invested in railway securities, and there are about 11,000,000 depositors in these savings banks. So, there are 41,000,000 people who are vitally interested, either as holders of insurance policies or depositors in savings banks, in the success of this great piece of machinery. When, therefore, you speak of the number of our citizens directly interested in the railways, you really are speaking of at least 61,000,000,—the 20,000,000 I mentioned, that are personally interested, because they work for the railways or for some collateral branch of the industry, and of those who own the securities, and of the 41,000,000 interested in the investments of insurance companies and savings banks. It is well to remember this momentous fact in considering this very difficult transportation problem.

Anxiety for the Future.

Many thoughtful men in the United States are filled with anxiety over the future, now that this country, whether it wishes to or not, is being forced into the position of a world power and compelled to take its part in international affairs to a greater extent than ever before.

It appears to be harder and harder to follow Washington's advice "to beware of entangling alliances." As a natural consequence "Preparedness" is discussed on all sides. There are several kinds of "Preparedness." All of our industries must be prepared,—our young men must be prepared,—labor must be prepared,—capital must be prepared,—our Army and Navy must be prepared, the government itself must be prepared,—and, last but not least, our railways must be prepared.

In a time of profound peace in this country, the railways are congested, and cannot carry satisfactorily the total load. What could they do in their present condition if the added burden of war were thrown upon them? Many industries would have to stop because the railways' first duty would be to handle the men and material incident to war.

Railway preparedness is, therefore, a vital *sine qua non* for adequate National Preparedness.

In order to meet the demands of peace,—to prepare the railways for the peaceful needs of industry,—the most general estimate is that the railways should spend for increased facilities at least $1,000,000,000 a year for several years to come. In making these preparations due regard should be paid to the part the railways would play in case of war. They should be more than prepared. They should be able to handle an abnormal business with as much smoothness and as little loss of time as prevail under ordinary conditions. Such preparation can only be brought about by a broad-minded policy in railway regulation. If the railways are to fulfil their mission, if they are to be of the greatest service to the people, if they are to provide for future needs, they must be permitted sufficient earnings to attract new capital.

Capital.

Capital has been mobilized in this country, and in the main, with great benefits to all. It has been constructive, not destructive, because in no other way could it earn a return. It has been bold, and, at times, foolish. It has made its mistakes because it has been directed by human beings who, at times, have failed to give due weight to the public good. As a result, public opinion was aroused

and this irresistible force decreed that organized capital, or capital in a mass, must subject itself to certain regulatory measures. Things that were considered absolutely essential to the conduct of business twenty-five years ago are now frowned upon and even classed as crimes. The rebate and pass days have gone from the railway world.

Railways and business, however, have adjusted themselves to the new conditions. Laws affecting railways and business are now being worked out that would have been considered impossible a generation ago, and yet, in the present complicated modern life, some are doubtless necessary. When the unworkable features of some of these laws are eliminated, business will adjust itself, and capital, although perplexed and frightened, will go forward with its work; because the country must perform its functions and it must be as fair to capital as capital must be fair to the country.

Labor.

A natural sequence to the organization of capital was the organization of labor. Capital and the public have been partly at fault for not realizing at times the changing conditions. Lack of brains in some of the men who supervise and direct others has contributed to the dissensions. Labor, at times, has been treated with too little consideration. As a result, labor organized in order to present in forcible and concrete form its views of the industrial situation and also to record the natural desire of every healthy man to improve the conditions surrounding himself and his family. But just as organized capital was forced to be controlled and regulated in the interest of the public, so, organized labor must be controlled and regulated. No one can object to organized labor unless its acts injure the general welfare of the public. It too must be constructive, and not destructive.

Excessive Legislation and Regulation.

From 1909 to 1915 the states enacted 60,001 and Congress enacted 2,013 new laws which involved the consideration of more than one half million legislative propositions, or an annual production of over 12,000 new laws to be assimilated by the business world. The Sixty-Third Congress alone considered 30,053 bills and enacted 700.

The measures enacted by the state and national bodies are estimated to cover 43,500 printed pages, and to include over 151,000 titles and subtitles; and the legislation covered a very wide range. Affecting the railways, alone in the years 1912, 1913, 1914, and 1915, there were 16 titles and 60 subtitles of legislation, and 3,016 bills were introduced into the legislatures, of which 442 became laws. In 1913, only two years ago, 1,395 bills were proposed in the state legislatures. In 1915 the agitation subsided somewhat, and only 1,093 bills were introduced.

In the mass of legislation passed were laws governing arbitration, train rules, equipment, passenger and freight trains, cars, signals, clearances, proper crossings, maintenance of tracks, stations, claims, trespassers, the character of reports to be made, beneficial associations, and countless measures affecting the general conduct of the railway business. Some of these laws conflicted with others, and nearly all imposed additional burdens upon the railways, added to expenses, and, to a certain extent, reduced the efficiency of the railways to produce the needed transportation.

Unification of Railway Laws.

During the past year there has been a unified and standardized banking and currency system tried, and not found wanting. The Federal Reserve System marked perhaps the farthest step in advance towards nationalized business activity yet undertaken, and its successful operation is ample proof of the soundness of the theory upon which it was built.

But there are yet other steps to be taken before the ideal of economic unity is worked out. Not only is it desirable that the commerce of the country, as represented by your organization, should be united in spirit and purpose, but it is equally necessary that the carriers of that commerce should be operated under a harmonious system of regulation having due regard to their functions as the bearers of interstate trade and the servants of the entire nation.

To-day the carriers of interstate commerce are the servants of forty-nine masters, of conflicting powers and desires, and if it be true that no man can successfully serve two masters, how confusing and inefficient must be the mental state of him who must serve the United States and a number of sovereign states.

The result of this conflict between state and nation has been a great waste of energy and loss of power to serve the public. A very large amount of the time of railway officers must be devoted to the discussion with the numerous regulatory bodies, and this time could be spent with better results in an effort to improve the efficiency of the railways. The regulators have been so anxious to take on new work that they are overburdened, and questions in dispute are not disposed of promptly and satisfactorily. One result of this excessive regulation has been to increase the price to be paid for new capital needed in the business.

It is obvious that as a result of governmental policy and economic conditions combined, the railways of the country have suffered materially, not only to their own loss, but to the vast detriment of the business community.

The deluge of laws and regulations and the divided authority is another cause of the present Malady of the Railways, and the public should consider it, and take steps to improve this feature of the situation.

The country should enter upon a period of constructive work with the owners and managers of the railways.

The Malady of the Railways cannot be cured until:

1. The public thoroughly realizes the fact that the railways are no different from any other kind of business in their ability to increase constantly all kinds of expenses, and at the same time reduce or not to advance the price of the article they have to sell,—transportation,—and keep the plant adequate to the needs of the country.

2. The public realize that extreme and conflicting regulation is hurting them.

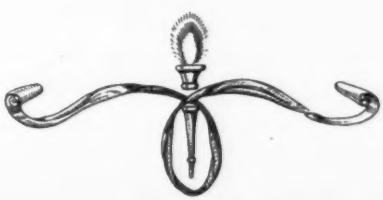
3. There is reasonable control and regulation of the great organizations of labor that are engaged in the work of various public utilities, including railways, upon which the welfare of society depends.

4. Instead of passing additional laws, an account is taken of those now in existence, to be followed by classification, amendment, and repeal some of them.

5. It is realized that the railways are more and more national, and less and less state in character, and that state control and regulation must be subordinate to national control.

6. The nation has a right to expect of every man that he give the maximum of physical and mental effort in whatever position he occupies.

Congresses are held to help along the cause of "Good Roads," "Conservation of Natural Resources," "Improved Waterways," "Merchant Marine," "Irrigation," all important subjects. But without "good railways," wagon roads, waterways, natural resources, irrigated lands, and merchant marine,—all would be limited in their ability to serve the people of the United States.



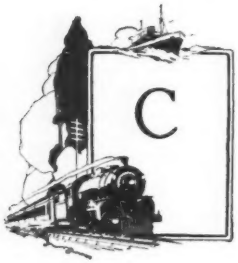
SLABS OF COPPER READY FOR SHIPMENT TO FRANCE.

These slabs weigh 280 pounds each and are destined to be converted into bullets and shells. Shipping facilities are being used to their utmost capacity to transport war munitions. Railroad and steamship lines are pleading lack of cars and vessels to handle the freight.

The Merchant Marine

—From Report of Merchant Marine Committee of the Chamber of Commerce of the United States—

WILLIAM H. DOUGLAS, Chairman



CLOSELY allied with the admitted necessity of promptly strengthening our military forces comes the question of the merchant marine, and the present war has clearly shown that a nation without commercial vessels to use as transports, colliers, etc., is seriously handicapped, and that joint co-operation between the Navy and the commercial vessel is essential for effective defense of a country.

It is stated by English authorities that had they not been able to secure promptly the requisite steamers required to transport troops from their colonies to essential points of defense, as well as carry enormous quantities of provisions, ammunition, horses, and other war equipments, that they would have been greatly inconvenienced, and that much of the

benefits gained by the strength of their Navy in clearing the seas of their enemies, and keeping the trade routes of the world open, would have been lost.

The securing of steamers or sailors for general purposes has become more difficult month by month, rates being asked which are practically prohibitive. Freights have risen on most all classes of goods from 500 to 800 per cent, and prices for charters in proportion. Opportunities to ship have been gradually lessening, until the difficulty and risk of attempting to do business abroad has become almost unbearable. Vessels of all classes, types, and age have been pressed into service, many of them unsuitable for long-voyage business, and under normal conditions marine insurance would not have been obtainable, but so great has been the demand for space on all regular lines it has been eagerly sought for at almost any rate, and ships have been chartered at figures which, in many cases, have given a prepaid freight list of two or three times the actual value of the vessel for one voyage.

This situation is not so surprising, however, when we stop and consider that about 1,000,000 gross tons of ships have been destroyed,—that some 4,000,000 or 5,000,000 tons of German shipping have been interned since August, 1914,—that 2,000 to 2,500 English steamers, representing 3,000,000 to 4,000,000 gross tons, have been requisitioned for war requirements,—that other nations have also largely employed their fleets for war necessities, thus accounting for nearly one fourth of the world's commercial fleets.

The danger of any one power having practically supreme control of the waterways of the world must have been impressed on the mind of every student of international affairs. Had the nations engaged in the present struggle been about equal in naval strength, so that tonnage would not have been available, the United States, instead of doing the enormous trade we have enjoyed, would have been seriously handicapped. Fortunately for us one nation was able to command the seas, and could also spare vessels essential to handle our exports, which it was to their advantage to do.

We hold that while we do not wish to control the ocean in a carrying way, that it is not desirable others should so control, to the end that they absolutely dominate all commerce.

The true and proper balance of power in foreign trading should be that all nations who have a coastline and trade with the world should have vessels under their own flags to carry a liberal percentage of their exports and imports, thus securing general commercial protection.

Recent Legislation.

What have we done since August, 1914?

On August 18th, 1914, an act was passed allowing foreign-built vessels, over five years of age, to obtain American registry. Under this law some 175 to 200 steam and sail vessels have come under the American flag. The list includes a vast variety of ships, tank steamers, passenger steamers, pleasure steamers, etc., aggregating some 750,000 tons. An analysis of the situation shows, however, that a large percentage of these boats were already employed in American trade, for special purposes, as the vessels of the Standard Oil Company, the United States Steel Corporation, the United Fruit Company, etc.; so in reality the number of steamers gained for the general carrying trade is not nearly so large as has been taken for granted.

By executive order, alien officers on ships admitted to registry may serve until 1921, and vacancies may be filled by aliens until September, 1916. Our laws of inspection, measurement, etc., were also suspended until said date.

Many foreign nations, alarmed at the freight situation, and realizing the necessity to conserve tonnage for their own use, have issued temporary regulations preventing the sale of any vessel flying their national flag. This action has been taken by England, Germany, France, Norway, Sweden, Austria, Italy, Spain, Japan, etc.

The present government bill provides that hereafter no vessel registered or enrolled under the laws of the United States shall be sold to any person, firm, or corporation other than a citizen of the

United States, or transferred to any foreign registry without the approval and consent of the board, and that all vessels purchased, chartered, or leased from the board shall be registered or enrolled as vessels of the United States.

A Bureau of War Risk Insurance was also created under government control, to insure American vessels during the war, and has been of considerable advantage to our shipping. It is a pity, however, that authority was not given the Bureau to cover risks on American goods, whether shipped in American or foreign vessels, as such action would have saved our shippers considerable trouble and loss, as they had to cover in foreign insurance companies, at high rates.

The seamen's act passed by Congress became effective November 4th, 1915, for American vessels, and applies to foreign ships March 4th, 1916. This law has created much discussion throughout the country.

The Attorney General has decided that requirements as to life-saving equipment and the manning of such equipment do not apply to foreign vessels owned in countries with whom the United States still has reciprocity treaties. Our ships are thus further placed under a heavy handicap.

Congress has again convened, and the government is still proposing, with some changes, again to advocate legislation along the same lines as last winter, and has only partly abandoned the plan of government operation.

The bill authorizes the shipping board to construct vessels in American shipyards, Navy yards or elsewhere, or to purchase or charter vessels to meet the commercial necessities of the United States suitable for naval requirements, having in view and giving authority to the board to charter, lease, sell, or recharter such vessels to citizens or corporations to be used in trading with foreign countries or with American dependencies, and for this purpose $50,000,000 are provided by the issue of Panama Canal bonds.

Proposed Uses of Vessels.

Gentlemen prominent in the Administration have stated that we should start promptly lines to Brazil, Uruguay, and Argentina, South America, touching at the important ports of these countries, to Columbia, Equador, Peru, and Chile, and along the west coast of South America, to the Orient, touching at Honolulu, and to the leading ports in Japan, China, and the Philippines, and we presume it is also intended to take in Australasia, South Africa, and India, etc. This would mean the establishment of ten to twelve lines at least, and would utilize more steamers than could be built if the entire $50,000,000 appropriated are given over for that purpose.

It has also been stated that a mobile fleet is desired to care for our cotton growers, our timber merchants in the south and on the west coast, and to protect our grain dealers on the east and west coasts.

The most expert testimony which we have been able to obtain warrants the statement that $50,000,000 is not likely to give more than fifty to sixty vessels of the size and type clearly essential and adaptable for the establishment of lines mentioned.

American Construction.

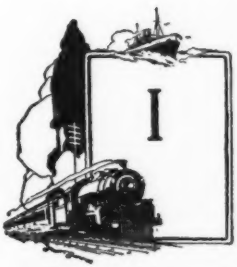
It is well known that our shipbuilding yards are unable to take further contracts for new work, having orders ahead for at least two years, and that we can expect no help from foreign yards at present, or even for a considerable time after the war.

The present war has already taught us many lessons, and almost daily new issues are arising. We are told that international laws have unfortunately broken down, and that they have been ruthlessly violated by various nations who claim they are justified by reason of the unusual war conditions and the fierceness and bitterness of the unfortunate struggle. It is too early for the history of international complications to be written, but it is hoped that the lesson will be studied and learned by us, and that we will not fail to see its application so far as our marine necessities are in question, and that the United States will never again be placed in the predicament and humiliating position which is ours to-day.

The Constitution and Powers of the Federal Trade Commission

BY LAWRENCE B. EVANS

Of the Boston Bar



IN 1786 George Washington wrote to John Jay: "I do not conceive that we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union, in as energetic a manner as the authority of the State government extends over the several States." [1] When he and his associates in the Federal Convention submitted the Constitution to the states, it is probable that none of them realized how much they had accomplished toward creating "a power which will pervade the whole Union," by inserting in the new Constitution the words, "The Congress shall have power to regulate commerce among the several states." For many years after the adoption of the Constitution this clause was almost unnoticed. Little legislation of importance was based upon it, and it was not until 1824 that the first case arising under it was decided by the Supreme Court. In his great opinion in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, Chief Justice Marshall dealt in a comprehensive manner with the meaning of the clause, and laid down the principle that the whole of interstate commerce, whatever that term might include, was within the paramount power of Congress.

The last thirty years have seen a marked change in the attitude of Congress and the public toward the commerce clause. No other part of the Constitution, except, perhaps, the 14th Amendment, is now so frequently invoked nor made the subject of so much legislation of the first importance. Acting under its authority Congress has brought much of both the economic and the social life of the nation under its control. A brief recital of the most important regulations adopted within this period will give a concrete conception of the extent to which a power has been created which in Washington's phrase "pervades the whole Union in as energetic a manner as the authority of the State governments extents over the several States."

First in order was the interstate commerce act, enacted in 1887, and many times amended. Its predominant purpose was to prevent unreasonable and discriminatory rates,[2] but the Interstate Commerce Commission, the organ established for its administration, was not given authority to fix rates.[3] This power was conferred by the Hepburn act of 1906, which also forbade transportation companies to carry their own commodi-

[1] The whole of this interesting and important letter may be found in Evans, Writings of Washington, 261–265.

[2] Texas & Pacific R. Co. v. Interstate Commerce Commission (1896) 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

[3] Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission (1896) 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. (1897) 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

ties,[4] regulated the giving of free passes,[5] and brought pipe lines,[6] express companies [7] and sleeping car companies [8] under the jurisdiction of the Commission. In 1910 that jurisdiction was further enlarged by being extended over telegraph and telephone companies,[9] and the Commission was also empowered to suspend advances in rates.[10] By the Panama act of 1912 the Commission was given authority over commerce which moved by both land and water, but not over that which moved by water alone. In 1913 the Commission was directed to undertake a physical valuation of all the property owned by every carrier subject to its jurisdiction.

The interstate commerce act was soon followed by the Sherman anti-trust act of 1890, which provided that "every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." This act has been applied to combinations among transportation companies,[11] to holding companies which interfere with the freedom of interstate commerce,[12] to combinations of manufacturers for the purpose of controlling the course of trade,[13] and to labor unions conducting a boycott which interfered with interstate commerce.[14] In 1906 Congress enacted the employers' liability act which considerably modified the fellow-servant rule of the common law as applied to the employees of carriers. As this act applied to persons in both interstate and intrastate commerce, it was held unconstitutional.[15] Two years later Congress enacted a similar law which applied only to persons actually engaged in interstate commerce, and this was sustained.[16] Other measures designed for the protection of the same class of persons are the safety appliance acts, enacted in 1893 and the years following,[17] and the hours of service act of 1907.[18]

This great body of legislation in regulation of interstate commerce was further increased in 1914 by the enactment of the Federal trade commission act and the Clayton anti-trust act. The latter, in so far as its subject-matter is concerned, is in the nature of an amendment to the Sherman act of 1890. Among other things it undertakes to prevent all persons engaged in interstate commerce from discriminating in prices between different purchasers of commodities, or from according preferential treatment to one person over another. Corporations engaged in interstate commerce are forbidden to purchase the stock of another corporation when such purchase would substantially diminish competition, and the right of individuals to act as directors in more than one corporation is restricted. The relation between carriers and the corporations from which they obtain

[4] United States ex rel. Atty. Gen. v. Delaware & H. R. Co. (1909) 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

[5] Louisville & N. R. Co. v. Mottley (1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

[6] Pipe Line Cases (United States v. Ohio Oil Co.) (1914) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

[7] Barrett v. New York (1914) 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Kindel v. Adams Express Co. (1908) 13 Inters. Com. Rep. 475.

[8] Corporation Commission v. Atchison, T. & S. F. R. Co. (1912) 25 Inters. Com. Rep. 120.

[9] H. B. Williams v. Western U. Teleg. Co. (1913) 203 Fed. 140; Chesapeake & P. Teleph. Co. v. Manning (1902) 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

[10] Re Investigation of Advances in Rates in Official Classification Territory (1911) 20 Inters. Com. Rep. 243.

[11] United States v. Trans-Missouri Freight Asso. (1897) 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

[12] Northern Securities Co. v. United States (1904) 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

[13] Addyston Pipe & Steel Co. v. United States (1899) 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

[14] Loewe v. Lawlor (1908) 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815.

[15] Employers' Liability Cases (Howard v. Illinois C. R. Co.) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

[16] Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) (1912) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

[17] St. Louis, I. M. & S. R. Co. v. Taylor (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

[18] Baltimore & O. R. Co. v. Interstate Commerce Commission (1911) 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

service or supplies is also regulated.[19] This act will be discussed more in detail later in this paper.

A few weeks before the enactment of the Clayton act, Congress passed the Federal trade commission act.[20] In so far as this act sets up any new rules of law for the government of interstate commerce, the gist of it is contained in the provision "that unfair methods of competition in commerce are hereby declared unlawful." This phrase introduces a new term into the law. The courts have long been familiar with the term "unfair competition." They will now have to determine what are "unfair methods of competition." The emphasis apparently is to be placed upon the mode rather than the substance of the competition.[21]

For the administration and enforcement of this great body of legislation, three powerful boards have been created, —the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission. The powers with which these bodies are vested are scattered through various statutes, and in considering the functions which each is to exercise in the regulation of interstate commerce, it is necessary to keep this whole body of legislation in mind. This is particularly true of the enforcement of the Clayton act, § 11 of which provides:

> That authority to enforce compliance with §§ 2, 3, 7, and 8 of this act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce.

Even though the jurisdiction of the Federal Trade Commission is derived wholly from the act which created it and from the Clayton act, there is much in the history of the administration of the interstate commerce act which will be of assistance in the solution of the problems which the Federal Trade Commission must meet.

The jurisdiction of the Federal Trade Commission is defined in §§ 5 and 6 of the Federal trade commission act and in §§ 2, 3, 7, and 8 of the Clayton anti-trust act. The substantive provisions of law found in the two acts, in so far as they affect the Federal Trade Commission, may be summarized as follows:

By the first sentence of § 5 of the Trade Commission law, a new offense is created. Unfair methods of competition in commerce are declared unlawful. By subsequent provisions, however, this sweeping condemnation is much restricted. The Federal Trade Commission is charged with the enforcement of this clause, but banks and common carriers are expressly exempted from the jurisdiction of this Commission, and no other board or commission is authorized to proceed against these two agencies of interstate commerce because of violations of this provision. The practical effect, therefore, is to exempt banks and common carriers from the rule as to unfair methods of competition. The rule is further restricted by the provision that the Commission is to begin proceedings for its enforcement only when it appears that the proceeding would be "to the interest of the public." By this saving clause much is left to the discretion of the Commission, and apparently its decision as to whether or not a proceeding would be to the interest of the public is final. Since the object of the law is the protection of the public, rather than of individuals, some such provision is obviously necessary. Otherwise the Commission would be overwhelmed with petty complaints, and the whole law would break down under such a burden. This provision is only another illustration of the ancient maxim, *De minimis lex non curat.*

Section 2 of the Clayton act deals with price discrimination. The chief provision of this section is so hedged about that on careful analysis it becomes much

[19] The official text of the Clayton anti-trust act may be found in 38 Stat. at L. 730, chap. 323.

[20] The official text of the Federal trade commission act may be found in 38 Stat. at L. 717, chap. 311.

[21] In this brief summary of legislation for the regulation of interstate commerce, I have drawn freely upon a note in my Leading Cases on American Constitutional Law, 278–280.

less formidable than it appeared to be on a first reading. It is declared to be unlawful for any person engaged in commerce to make any discrimination in price between different purchasers of commodities "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Discrimination in price *per se* is not condemned. It is only when such discrimination results in a substantial lessening of competition, or tends to create a monopoly, that it falls under the ban of the law. The section also recognizes the fact that competition of other sellers cannot be ignored in the making of prices, and price discrimination made in good faith to meet such competition is declared to be lawful. A further proviso is to the effect "that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions, and not in restraint of trade." [22]

Section 3 of the Clayton act deals with what are commonly known as conditional or tying contracts. It provides that no one engaged in commerce shall lease or sell, or contract to lease or sell, any commodities, whether patented or unpatented, for use, consumption, or resale within the United States on condition that the purchaser or lessee shall not deal in the commodities of a competitor of the seller or lessor, when the effect of such a transaction would be the substantial lessening of competition, or a tendency to create a monopoly. Here again it will be noted that the thing forbidden is not condemned *per se*, but only where it substantially lessens competition or tends to create a monopoly.

Sections 2 and 3 of the Clayton act apply to all persons, partnerships, firms, and corporations engaged in interstate commerce. Section 7 applies only to corporations. It regulates the ownership of stock in competing corporations, and provides that no corporation engaged in commerce shall acquire the whole or any part of the stock of any other corporation also engaged in commerce when the effect of such acquisition would be substantially to lessen the competition between the two corporations, or to restrain such commerce in any section or community, or tend to create a monopoly. This section it will be noted is less liberal than §§ 2 and 3 in defining the transactions to which it is to apply. Sections 2 and 3 govern only those transactions which substantially lessen competition or tend to create a monopoly, while § 7 applies also to transactions the effect of which is "to restrain such commerce in any section or community." The definition of the term "restrain" will play an important part in the application of this section. Holding companies are also dealt with in that clause which provides that no corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations where the acquisition of such stock, or its use by the voting or granting of proxies, may be substantially to lessen competition between such corporations, or tend to create a monopoly of any line of commerce. The rigor of this rule is mitigated, however, by exempting from its operation corporations which purchase the stocks of other corporations solely for investment, or which form subsidiary corporations for the actual carrying on of their immediate lawful business.

Section 8 of the Clayton act deals with interlocking directorates. From and after October 15, 1916, no person may at the same time be a director in any two or more corporations engaged in commerce, any one of which has capital, surplus, or undivided profits aggregating more than $1,000,000, if such corporations have been competing with each other in such a way that an agreement between them to eliminate competition would be a violation of any of the antitrust laws.

Such are the provisions of substantive law with the enforcement of which the Federal Trade Commission is charged.

[22] In Great Atlantic & P. Tea Co. v. Cream of Wheat Co. (1915) 224 Fed. 566, the district court of the United States for the southern district of New York holds that this provision of the Clayton act permits the defendant to refuse to sell to the plaintiff.

In performing this function it is important to note again the distinction between the duties of the Commission in the enforcement of the act which created it and its duties in the enforcement of the Clayton act. This distinction can perhaps best be made clear by noting the language of the two acts. In the Federal trade commission act, § 5, it is provided:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

The corresponding clause in the Clayton act is substantially the same except that the phrase in italics is omitted. This omission is not accidental, but marks a fundamental distinction between the two laws. The prohibition of unfair methods of competition is primarily for the protection of the public rather than for the protection of the individual who is the immediate sufferer, and the phraseology of the act implies that, in the judgment of Congress, there may be unfair methods of competition which concern the public so slightly that the government may disregard them. Whatever remedy may be open to the injured individual in such cases must be sought before some other tribunal. In the case of violations of the Clayton act, however, nothing is left to the judgment of the Commission as to whether a public interest is involved. Such an interest is conclusively presumed, and it is made the duty of the Commission to institute proceedings whenever it has reason to believe that the act has been violated.

At the hearing which the Commission is authorized to hold, the party complained of shall have a right to appear and show cause why no order to desist from the violation of law which has been charged should be issued by the Commission. Upon due cause shown any person may intervene and appear at the hearing in person or by counsel. All testimony taken must be reduced to writing and filed at the office of the Commission. If the Commission shall be satisfied that the law which it is its duty to enforce has been violated, it shall make a report in writing, stating its findings of facts, and issue an order to the party complained of, requiring him to desist from violating the law. If this order is not obeyed, the Commission may apply to the United States circuit court of appeals within any circuit where the offense complained of was committed or where the offender resides or carries on business for the enforcement of its order, and shall transmit to the court a transcript of the entire record of the proceeding, including a copy of the testimony. The Commission's findings of fact, if supported by testimony, are declared to be conclusive, but the court may modify, affirm, or set aside the order made by the Commission. Students of the act have already questioned the constitutional power of Congress to make the Commission's findings of fact binding upon the courts, and this provision is certain to be contested.

An important provision as to new evidence may have been suggested by experience in connection with the administration of the interstate commerce act. It has been a subject of frequent complaint that parties often withheld essential evidence from the Commerce Commission and first introduced it in proceedings before the court for the purpose of reversing the action of the Commission. In a leading case this practice was severely condemned, and the Supreme Court said: "The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as prima facie evidence, that the facts of the case are to be disclosed before the Commission."[23] Even this warning was not sufficient to check the tendency of litigants to reserve material evidence until they appealed from the Commission to the courts, and this im-

[23] Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission (1896) 162 U. S. 184, 196, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

pelled at least one Federal court to say that unless it appeared that the Interstate Commerce Commission had itself excluded material evidence, the order of the Commission would be reviewed only on the testimony that was before the Commission when the order was made.[24] This matter is provided for in the legislation of 1914 in this way:

> If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence.

The action of the Commission in the issuance of an order to desist from violation of the law may also be reviewed by the circuit court of appeals on a petition of the party to whom the order was directed, and the court then has the same power over the order that it has in proceedings begun by the Commission for its enforcement.

Since the Commission cannot enforce its orders without the assistance of the courts, and since any person to whom an order of the Commission is directed may appeal to the courts, ample opportunity is presented for judicial review of the Commission's action. This is requisite as a necessary element in due process of law,[25] and Congress has made explicit provision for it. By this means the jurisdictional limitations upon the Commission will receive authoritative determination, and its action will be kept within its constitutional and statutory authority. In determining questions of this kind it seems probable that the courts will be guided by the rules which they applied in reviewing orders of the Interstate Commerce Commission. The considerations which the court must take into account in such cases have been well summarized in one case as follows: (a) all relevant questions of constitutional power; (b) all relevant questions as to whether the order is within the scope of the authority under which the Commission purports to act; (c) whether the order of the Commission, while in form within the delegated authority, has nevertheless been exercised in such an unreasonable manner that the court, in accordance with the elementary rule that it must look to the substance rather than the shadow, must set it aside; but (d) the court must recognize the proper functions of the Commission, and must not, under the guise of judicial review, usurp its authority.[26]

In addition to these quasi-judicial functions which have just been described, the Commission has important duties of a supervisory nature. All of its authority of this kind is derived from § 6 of the trade commission act, and extends only to corporations. Individuals and partnerships may be involved, however, in so far as they have relations with corporations.

The Commission is authorized to investigate from time to time the organization, business, conduct, practices, and management of all corporations engaged in commerce except banks and common carriers subject to the interstate commerce act, and to require from them in such form as it may prescribe annual or special reports or answers in writing to special questions concerning their organization and management and relation to other corporations, partnerships, or individuals. The exemption clause in this section deserves careful attention, for by its peculiar phraseology a class of common carriers is brought under the juris-

[24] Louisville & N. R. Co. v. United States (1914) 218 Fed. 89.

[25] I examined this subject in an article entitled, "Judicial Control of Commission Rate Making," in Case and Comment for April, 1915.

[26] Interstate Commerce Commission v. Illinois C. R. Co. (1910) 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. See also Interstate Commerce Commission v. Union P. R. Co. (1912) 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

diction of the Commission. Section 11 of the Clayton act provides that the enforcement of §§ 2, 3, 7, and 8 of that act, in so far as they concern common carriers, shall be vested in the Interstate Commerce Commission, and nothing is said as to whether such carriers are or are not subject to the interstate commerce acts; but if there are any common carriers engaged in interstate commerce which are not subject to the interstate commerce acts, they are made subject to the investigating power of the Federal Trade Commission. Upon its own initiative the Commission may, and upon the application of the Attorney General, it must, investigate the manner in which any decree in a suit brought by the United States to enforce the anti-trust laws has been or is being carried out, and upon the direction of the President or of either House of Congress it must investigate and report upon any alleged violation of those laws. Upon the request of the Attorney General it must investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts, and thus assist such corporation to make the conduct of its business conform to this law. This provision, which seems to intend that the Commission shall play the role of elder brother to any well-meaning but perhaps misguided corporation which is struggling to act righteously, raises the question as to whether a corporation which accepts the suggestions of the Commission is thereby made immune to prosecution for subsequent violations of the laws which the Commission is charged to enforce. From time to time the Commission may publish as it may deem expedient such information as it has collected, except trade secrets and names of customers, and it may submit annual and special reports to Congress, together with recommendations for additional legislation. It may classify corporations and make rules and regulations for carrying out the purposes of the trade commission act. And lastly, it may investigate trade conditions in foreign countries, and report to Congress thereon. An investigation of this sort has been undertaken and is now in progress.

In order to make effective the extensive powers as to supervision and investigation with which the Commission is vested, the act provides that when so directed by the President, the several departments and bureaus of the Federal government shall furnish to the Commission all the records, papers, and information in their possession relating to any corporation subject to its jurisdiction. The Commission is also empowered to examine the records of corporations under investigation and to compel the production of papers and the attendance of witnesses. In case of disobedience of any order of the Commission issued in the course of an investigation, the Commission may apply to the district courts of the United States for assistance, and failure to obey the order of the court may be punished as contempt.

Another duty of the Trade Commission makes it distinctly an organ of the courts. Section 7 of the trade commission act provides that in any suit in equity brought by or under the direction of the Attorney General, as provided in the anti-trust acts, the court, if it be of the opinion that the complainant is entitled to relief, may refer the suit to the Commission as a master in chancery to ascertain and report an appropriate form of decree therein. The court may adopt or reject this report in whole or in part, and enter such decree as it may see fit. This provision was perhaps suggested by the experience of the government in certain prosecutions under the Sherman act. The attempt to frame decrees in the Standard Oil and American Tobacco Company cases, which would terminate the illegal conditions which the court had condemned, showed that neither the court nor the Attorney General could deal effectively with the situation, which was economic rather than legal in its nature.

Such, in brief, are the chief provisions of the new legislation concerning the Federal Trade Commission and its functions. Their meaning and effect can only be determined by experience.

Lawrence B. Evans

*Rate Contracts in Relation to Contract Clause of Federal Constitution**

BY CHARLES R. BROCK

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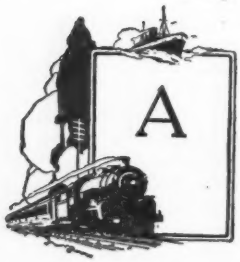

AT A MEETING of Phi Delta Phi a year ago, it was my privilege to discuss briefly the history and characteristics of public utilities, together with the basis of the power of their regulation and the causes of their unpopularity. I attempted to differentiate between the business that is wholly private, the business that is wholly public, and that class of business which is a combination of the other two, and to which has been ascribed the name, "Public Utility." I attempted to show that the public utility to some extent partakes of the attributes of both of the other classes of business, and pointed out that a business at one time purely and wholly private may, by force of circumstances, partake of the characteristics of a public business, and to the extent that it becomes a public business it becomes *pro tanto* subject to reasonable regulation by the state. The basis of this right to regulate I ascribe to the fact that the business assumed the attributes of a virtual monopoly. The hostility to public utilities, I pointed out, had resulted from the natural disposition of those operating such utilities to treat them as private concerns, and because the right of the state to regulate them had been so persistently resisted that occasion was afforded for some honest men, and particularly the demagogue, to suggest and urge government ownership.

With the universal recognition of this right of the state to regulate public utilities, some exceedingly interesting legal questions are being presented. I desire to speak of one of them,—that arising where the state now attempts to exert its power of rate regulation in violation of a contract on the subject, previously made with the utility, either by the state or by one of its municipalities acting in pursuance of authority alleged to have been conferred upon it by the state.

I suppose it is needless to say that the power of regulation to which I have referred is comprehended within what is generally known as the police power. This power is difficult of definition. Blackstone called it the public police, and defined it as "the due regulation and domestic order of the Kingdom; whereby the individuals of the state like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations."

Judge Cooley declared: "The police power of a state in a comprehensive sense embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and prevent offense against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."

Tiedeman says that the continental jurists include under the term "police power" not only those restraints upon private rights which are imposed for the general welfare of all, but also all the govern-

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mental institutions which are established with public funds, for the better promotion of the public good, and the alleviation of private want and suffering.

Under the constitutional law of the United States, the police power, Tiedeman declares, is simply the power of the government to establish provisions for the enforcement of the common as well as the civil law maxim, *Sic utere tuo ut alienum non lædas.*"

The limitations upon this power are such, and only such, as are to be gathered from the Constitution of the United States and the Constitution of the particular state where the power is being exerted. We are accustomed to say that Congress may enact such laws, and only such laws, as are comprehended within the authority delegated to that body by the Constitution of the United States, as we are also accustomed to say that the power of the state legislature is plenary, except as it is specifically limited by the Constitution of the United States, or the Constitution of the state.

In any event, whatever limitations are imposed upon the state legislature in the exercise by it of the police power are to be found in the Federal or the particular state Constitution.

To the limitations thus imposed the legislature may add no others. It seems, therefore, that the police power embraces all state legislative, governmental powers except those which the people as a whole, and as a collectivity, and as constituting the only supreme power under our system of government, have taken away by the limitations contained in the Constitution of the United States, and also excepting such limitations as the people of the particular state, by their state Constitution, have imposed.

Accordingly it has been said, and it is generally accepted, that this particular power inheres in sovereignty, and is not the subject of barter.

I have already stated that, as respects this power, the state legislature may impose no limitations whatever. This is another way of saying that it may not surrender the power. Whatever the power may be, whether properly limited to legislation in the interest of the public morals, the public health, the public safety, the general welfare, the public convenience, or whether it be extended, if indeed that be an extension, so as to comprehend any legislation "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," when once conceded to exist, the power of the legislature becomes plenary so far as the contract clause of the Constitution is concerned, although, like any other law, the police power is subject to the limitations imposed by other clauses of the Constitution, as for example, the *ex post facto,* the due process, and the equal protection clauses.

The point here is, and that is the only point pressed, that the contract clause of the Federal Constitution, when properly interpreted, constitutes no limitation whatever upon the exercise of the police power.

In the Boston Beer Company Case, in 97 U. S. 32, 24 L. ed. 992, Mr. Justice Bradley said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex,* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

By repeated decisions this doctrine has become common learning.

It is fundamental, therefore, that when a particular power is conceded to be comprehended within the police power of the state, it is thus established that the particular power is not the subject of barter, and that no contract can operate to limit the power of the state to legislate upon that subject. In all such matters the state and its subdivisions, the municipalities, acting under authority from the state,

exercise a governmental power,—a power which must always be distinguished from the exercise of a proprietary power, as, for example, where rights upon the highways are bestowed, and which may properly be said to be a subject-matter of contract.

When it was contended by some, and supposed by others, that the regulation of rates charged by public utilities was within some of the limitations imposed by the Constitution of the United States, and that competition must be essentially relied upon to effect a regulation, it is now discovered that contracts in many instances were entered into between municipalities and public service corporations by which, under express authority from the state, an agreed schedule of rates was fixed for a specific and definite term of years not yet expired.

In some instances it may be this schedule of rates is too low to insure a proper public service, or a fair return to the investor. In other instances they are too high. The state creates a commission, and clothes it with power to prescribe the rates to be charged. In one instance application is made by the utility to have the rates increased. In another instance application is made by the municipality to have the rates lowered. In both instances the other party to the contract protests against the action of the Commission, and asserts the existence of a vested right which neither the state nor the Commission has the power to impair. Is such a contention tenable? Upon authority it seems to be. Upon principle I have ventured to suggest it is not.

If it be assumed that rate-making is law-making, that the power is vested in the state to regulate rates, and that in the regulation thereof the state acts under the police power, it must inevitably follow that no inviolable contract right can be acquired between the state or one of its municipalities and the public service corporation, unalterably fixing for a term of years the rates to be charged. To hold otherwise is to assume that the state either immediately or mediately may bargain away one of its governmental powers. It is to say that the police power is a subject of barter.

It will be interesting to note a few suggestions of the Supreme Court of the United States in relation to this question. For example, in Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, it was assumed that express power had been conferred upon the city of Los Angeles to regulate telephone rates within said municipality. In the supposed exercise of this authority the city entered into a contract with the telephone company, conferring upon the latter the right to use its streets for telephone purposes during the term of fifty years, and prescribing as a part thereof the rates which should be charged for telephone service during that period. Subsequently the municipality by an ordinance modified the schedule of rates, and it was contended by the telephone company that the latter ordinance impaired the previous contract, in violation of the Constitution of the United States.

Discussing the question thus presented, the Supreme Court of the United States said: "Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state, are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point.

"It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. . . . But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

It is not rendered clear how the state may surrender its governmental power for what the court may be pleased to designate as a "term not grossly unreasonable in point of time." If it be true that such a power is not the subject of barter, and may not be surrendered, then it may not be the basis of a contract at all; and although a contract be made, it seems to me it must be held that it was made in the light of the power of the state at its own pleasure, and in its own discretion, to resume the authority, and thus terminate the contract.

If this power inheres in the state, it is no less effectively vested in the state than, for example, is the power vested in Congress to regulate interstate commerce. The failure to exert the power for any particular period in no respect detracts from the power. This was expressly ruled by the Supreme Court of the United States in Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42, with respect to a contract between the railroad company and Mr. Mottley, made in settlement of a personal injury which Mottley had sustained through the negligence of the company. In addition to other considerations at the time paid, the railroad company agreed to issue from year to year an annual pass to Mr. Mottley over certain portions of its line of railway, during his life. Subsequently Congress exercised its ever-existing power to regulate interstate commerce, and, in a law enacted, prohibited discrimination, and imposed certain penalties for so doing. The railroad company thereafter refused to issue the annual pass. Mottley sought to compel it to be issued. The court held that he had no vested right to the pass, growing out of the contract; that the contract must be held to have been entered into with knowledge on the part of both of the contracting parties that Congress might at any time enact a law which would render the contract unlawful, and that no vested right could be acquired under such contract.

In Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, however, the Supreme Court ruled that a contract with a water-works company fixing maximum water rates to private consumers for the period of thirty years, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and as such is protected against impairment by the contract clause of the Federal Constitution. In the course of the opinion the court said:

"That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt."

Of course, upon the question thus stated, there is no doubt. Nevertheless, that is a very different proposition from the governmental power of prescribing rates, and of course sheds no light upon the question, except as it emphasizes that the proprietary rights are the subject of barter, while governmental rights are not.

You will observe that in the Home Teleph. & Teleg. Cos. Case to which I have referred, the Supreme Court says that a municipality having due authority from the state may prescribe a schedule of rates to be charged by a a public service corporation, by an inviolable contract, for a definite term, not grossly unreasonable as to duration, thus apparently limiting such power to those cases where it is exercised for what the court conceives to be a reasonable time.

On the contrary, in the case of Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the court declared:

"There can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rate of fare, and so to bind, during a specified period, any future common council from altering or in any way interfering with such contract. . . . The contract having been made, the power of the city or the state, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract."

Upon consideration of these cases and others that might be mentioned, it will appear that the rule announced, at least *arguendo* in the Detroit Citizens' Street R. Cos. Case, is very greatly relaxed and modified by the language in the Home Teleph. & Teleg. Cos. Case. The power of the state to regulate the rates of public service corporations is no longer open to controversy. That this power constitutes a part of the police power of the state seems equally certain. At least no one has yet attempted otherwise to classify it. Of such a power it was declared in the Boston Beer Cos. Case, and many times since reiterated, that the legislature cannot devest itself.

It seems to me, therefore, inevitable that with the universal recognition of the power of the states to regulate the rates to be charged by intrastate public service corporations, and with the creation of commissions intrusted with this particular power in practically all of the states, it must be held that these commissions, in the performance of their duties, can be in no respect hampered by any existing contracts attempting to prescribe the rates to be charged; and in my opinion, when the question is fairly and squarely presented to the courts, upon the principle which I have attempted briefly to outline, it will be held that the state itself is without power, either directly or indirectly, through the medium of one of its municipalities, by inviolable contract, to prescribe the rates to be charged by any public utility.

In view, however, of the utterances upon the subject, although made at a time when probably the character of the question was not fully appreciated, and the practical importance of the question, as rate regulation is being enforced by legislative commissions, it will at least be interesting to every lawyer to observe the further development of the law as related to this particular subject. It presents live issues, probably with some municipality in practically every state of the Union, and the next few years of necessity will witness an interesting development of this particular phase of the law in relation to public service corporations.

The difficulties involved were probably appreciated by the late Mr. Justice Brewer when, in Chicago & N. W. R. Co. v. Dey, 2 Inters. Com. Rep. 325, 35 Fed. 866, 1 L.R.A. 744, he said:

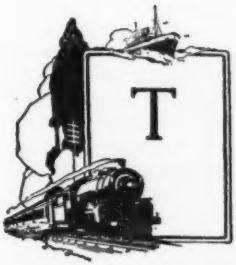
"While, in a general sense, following the language of the Supreme Court, it must be conceded that the power to fix rates is legislative, yet the line of demarcation between legislative and administrative functions is not always easily discerned. The one runs into the other. The lawbooks are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers."

When the learned judge referred to the line of demarcation between legislative and administrative functions, he may have felt that it would be possible to classify ratemaking as an administrative function, and thus remove it in some way from the police power of the legislature; and it may be that it remains for some astute jurist to make the differentiation referred to by Judge Brewer, but which he himself did not define, and thus afford an alternative by which the apparently irreconcilable doctrines to which I have referred may be brought into harmony. So far as I am concerned, however, I do not perceive how this is possible, and, as already indicated, I can see no escape from a classification which must ultimately place the power of rate regulation among the recognized police powers of the state. If this is done, the law applicable to the police power must be completely revolutionized, or else the courts must hold that no inviolable contract can be made which deprives the state of its regulatory power over the subject.

The Federal Trade Commission Acts

BY HON. RUSSELL L. DUNN

Of the San Francisco Bar



THE claim was made by their advocates, when the two acts (63d Congress, Nos. 203 and 212) which are now commonly referred to as the "Federal Trade Commission acts" were under consideration by Congress, that authority for their enactment was to be found in the so-called "commerce clause" of the Constitution, which provides that Congress shall have power to regulate commerce among the several states. It is presumed that this claim is still made by them, now that the President's Federal Trade Commission has been appointed and is preparing itself to enforce these acts.

But is this claim warranted? Do the provisions of these two acts constitute, severally, regulations of that particular commerce among our people where the seller of the articles of commerce is in one state and the buyer in another state, and as such are they severally referable to the clause of the Constitution which gives Congress power to regulate such commerce? Or, do not the provisions of the two acts constitute, under pretense of being regulations of the interstate commerce described, a pseudo-law which is not referable for authority either to the commerce clause of the Constitution or to any other clause?

The writer thinks that the true construction put on material provisions of these two acts will show them to be a pseudo-law, made without substantial authority in the commerce clause of the Constitution, or in any clause of it.

The act (63d Congress No. 203) which has created the Federal Trade Commission grants the Commission power,—

Sec. 6. "(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission, in such form as the Commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals, of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission."

"Commerce" is defined in § 4 of the act to mean "commerce among the several states or with foreign nations. . . ."

"Corporation," defined in the same section, does not include single persons or partnerships carrying on business, which would be "commerce." The second of the two acts (63d Congress No. 212) in § 1 defines "the word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations. . . ."

It is a curious difference in two carefully drawn cognate acts, which, materially affecting the scope of many of their

principal provisions, is suggestive of the purpose of the acts as being the "regulation" of certain persons who might happen to be officers of corporations engaged in "commerce," rather than the regulation of the "commerce" done by them.

Its effect on the scope of the provision of § 6 (b) above, requiring reports and answers in writing to be filed with the Commission by corporations, is that the Commission has no power to require such, or any, reports or answers in writing to specific questions from a person or a partnership engaged in the same commerce as the corporation.

It seems self-evident that a report, or an answer in writing to a specific question, made by a corporation by force of this provision of the act, is taken for public use. The Commission is empowered,—

Sec. 6. "(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress, and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

But neither in this act, nor in any other act, is there any provision made for payment to the corporation of the expense or cost to it of the report or answer in writing to a specific question. A report or an answer required under oath makes the corporation pay the fee or charge of the officer administering the oath. The filing of the report, or of the answer in writing, makes the corporation pay the cost of delivering the document to the office of the Commission, which cost at the very least is 2 cents for postage.

Therefore it seems certain that by force of the provision of this act requiring that corporations file reports with the Commission for public use, without providing for compensating the corporations for the reports, but subjecting the corporations (§ 10 of the act) to the forfeiture of $100 for each day of default of filing, the United States is taking by duress private property of the corporations for public use without just compensation, which is prohibited by the 5th Amendment to the Constitution. A corporation cannot be compelled by a statute to make a gratuity of any of its property, or of any of its service, to the United States.

The Commission is granted power by,—

Sec. 6. "(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation."

The curious difference in the definitions made in the two acts affects the scope of this provision. Neither the President nor either House of Congress has authority to direct the Commission to investigate and report the facts relating to any alleged violations of the anti-trust acts by a person or a partnership.

It is provided by the act, § 9,—

"That for the purposes of this act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . . . And in case of disobedience to a subpœna the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. . . . Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. . . . No person shall be excused from attending and testifying, or from producing documentary evidence before the Commission or in obedience to the subpœna of the Commission on the ground or for the reason that the testimony or evidence,

documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. . . ."

And in § 10,—

"That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."

The curious difference in the definitions, referred to above, made in the two acts, affects the scope of the provision of § 9, giving the Commission access to, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against. The Commission, under this provision, cannot take any access to or copy any documentary evidence belonging to a person or partnership engaged in the same commerce as the corporation. Nor can the Commission compel any agent or employee of a person or partnership to discover to it any evidence, documentary or otherwise, against the person or partnership employing him, whereas the act gives the Commission power to compel an agent or employee of a corporation to discover to it any evidence, documentary or otherwise, which he has knowledge of from his employment.

It seems to the writer that the provision (d) of § 6 of the act, above, is in conflict with the provision of clause 3, § 2, article 3 of the Constitution, that "the trial of all crimes, except in cases of impeachment, shall be by jury;" and that the provisions of § 9 of the act, above, are in conflict with the 4th Amendment to the Constitution,—

Sec. 1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized,"—

—and with the clause of the 5th Amendment,—

Sec. 1. "No person . . . shall be compelled in any criminal case to be a witness against himself."

Violations of the anti-trust acts are declared in these acts, which define what are violations, to be crimes, generally misdemeanors, but as to a few that they are offenses against the United States. It would seem that "alleged violations of the anti-trust acts" by a corporation are charges that the corporation has committed, or is committing, a crime.

Under the provisions of the act creating the Federal Trade Commission, the "investigation" of any alleged violations of the anti-trust acts by any corporation, which the President or either House of Congress may direct to be made by the Commission, becomes for the corporation a "proceeding" against it by the Commission for violations of the anti-trust acts which are charged, which is to say, that it must be on trial for crimes charged against it. The "proceeding" of the Commission tries the corporation on the charges. The Commission can do nothing else but conduct its proceeding as a trial of the corporation, since crimes are charged. The corporation can do nothing else in the proceeding but make its defense against the crimes charged. It is at the cost and expense of the same defense it would have had to make had the proceeding been initiated by the Commission under § 5 of the act, which provides that,—

"Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

—instead of being initiated by the President or a House of Congress under § 6, clause (d), of the act.

But in the proceeding under § 5 of the act the corporation would have a trial by a jury, that is to say, by the Commission as by a jury, and the benefit of its verdict, whereas in the investigation under § 6 (d), of the act, the trial is by the President, or by the House of Congress, as it may be, and not by the Commission, since the Commission makes a report, which from the nature of its direction, cannot be a verdict on the trial.

The right which the first provision of § 9 provides that the Commission shall have—access to, and the right to copy any documentary evidence of any corporation being investigated or proceeded against—is self-evidently a grant of authority to the Commission to search the papers of a corporation engaged in commerce at will, and to seize (by copying) the papers of a corporation at will. Two circumstances connected in the act with the authority seem to qualify it as unreasonable, and thereby in conflict with the prohibition of the 4th Amendment to the Constitution against unreasonable searches and seizures of papers.

The first circumstance is that the provision of the act granting the authority declares the purpose for which access to the documents (papers) and the right to copy (seize) them is taken, is to get "evidence" of the corporation against which the Commission is proceeding, the proceeding of the Commission being its trial of the corporation on criminal charges of violations of the anti-trust acts. In short words, the purpose of the authority is to get evidence which will compel the corporation to convict itself at the trial by the Commission.

The second circumstance is that the access to, and the right to copy the papers, are taken under duress imposed on the persons who have the custody of the papers of the corporation by the provision of § 10 of the act, that—

"Any person . . . who shall wilfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."

The imprisonment term limit, three years, for this offense, is the highest made by the act. The term limit of imprisonment on conviction for any other violation of the anti-trust acts is one year.

The provision of § 9 which requires that the officers and agents of a corporation charged with violating the anti-trust acts shall testify to the Commission against the corporation, and of necessity against themselves, since the impersonal corporation could only commit the offenses through their persons, and the act (No. 212, § 14) provides that they shall pay the penalties on conviction of the corporation for the offenses, under duress of penalties which would be imposed on them by the courts at the instance of the Commission, is self-evidently in conflict with the prohibition of the 5th Amendment to the Constitution, that no person in any criminal case shall be compelled to be a witness against himself. The prohibition is broad. Its words are, "in any criminal case."

The act undertakes to avoid conflict with this clause of the Constitution by providing,—

Sec. 9. ". . . But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpœna issued by it."

This exception of persons (directors, officers, or agents) of corporations from prosecution and penalty for the violations of the anti-trust acts by their corporations is only of such persons who appear before the Commission in obedience to a subpœna issued by it, and testify or produce evidence, documentary or otherwise. The exception does not avoid the duress or compulsion under which the person would be testifying against himself. He is under duress, compelled, to testify against himself until he has completed his testimony and produced the

evidence, documentary or otherwise, whereupon the provision of the act excepting him begins to run. This is plain from the provision of § 10, above, that his neglect or refusal to testify, or to produce the evidence, documentary or otherwise, in obedience to the subpœna, would make him liable to a fine not less than $1,000 or more than $5,000, and imprisonment not more than one year.

The purpose of attaching the precedent condition of obedience to the subpœna of the Commission, to the exception of a person from prosecution or subjection to penalty or forfeiture, which the act makes, seems to be to give the Commission authority to exercise its preference in selecting the particular persons, directors, officers, or agents of the corporation charged with violations of the anti-trust acts who should obtain the benefit of the provision excepting such from the prosecution or penalties. Those persons of the corporation who would not have been subpœnaed would continue to be subject to the penalties which would follow conviction of the corporation, as provided under § 14 of the second of the two Federal Trade Commission acts, No. 212, which follows:

"Sec. 14. That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

Considering these several related provisions of the two acts in operation, the Commission, constituted of practical men, can be foreseen, first, obtaining documentary evidence of the corporation against itself by means of its right of search and seizure of the documents; next, "tagging" with its subpœna the directors, officers, and agents whom they preferred should be excepted from penalty; and then, procuring the conviction with penalties of the directors, officers and agents not subpœnaed, by means of the documentary evidence of the corporation proved in testimony by the directors, officers, and agents who were subpœnaed.

The Commission is granted authority—

Sec. 6. "(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission."

This provision seems to the writer to be in conflict with the provisions of the Constitution, article 3:

Sec. 2. 1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under this authority; . . . to controversies to which the United States shall be a party."

The corporation, as to the manner, in all respects, in which the final decree of the court preventing or restraining the violation of the anti-trust acts has been, or is being carried out, is in the exclusive jurisdiction of the judicial power of the United States. The term of the provision, "to make investigation . . . of the manner in which the decree has been or is being carried out," defines a subject-matter in the jurisdiction of the judicial power, and therefore outside of the jurisdiction of the executive power exercised by the Commission and by the Attorney General.

The Commission is granted power—

Sec. 6. "(a). . . . to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce,

and its relations to other corporations and to individuals, associations, and partnerships."

The curious difference in definitions between the two acts, referred to above, affects the scope of this provision. The Commission may only investigate commerce by a corporation. It has no power to investigate commerce, the same commerce, by a person or by a partnership.

To investigate is to search, and it is to examine in detail and into detail. The 4th Amendment to the Constitution declares the right of the people to be secure against unreasonable searches. To avoid the prohibition of unreasonable searches it becomes unavoidable to read into the provision the qualification to the right to investigate, that the investigation the Commission may make under this provision shall be reasonable. The word "reasonable" must be read into the law in order to measure its scope.

What, then, would in law be a reasonable investigation of a corporation engaged in commerce? Quite clearly it would seem that the investigation, to be reasonable, must stop short of taking from the corporation anything which in its opinion, which is to say in the opinion of its directors, has value. The act itself, § 6 (f), effectually declares "trade secrets and names of customers" to be effects having value to the corporation, by prohibiting the Commission from making them public as information for public use, the term used in the section, "in the public interest," meaning "for the public use" or "for the people's use," since in our social compact it is the persons of the people, not the officers of their government or state, who have the right of the public interest.

It is indeed common knowledge that "trade secrets" and "names of customers" are vendible effects. There is no provision in the act for payment by the United States to the corporation for any of its information taken from it for public use by the search of the Commission. It is absurd to contemplate the Commission as an executive instrument of the Federal government to search corporations for information of no public use.

In the end, the force of the provision, § 6 (a), granting the Commission power to investigate corporations engaged in commerce, seems to resolve itself down for operation into a Federal government license issued to the Commission by the President to accept in behalf of the United States, by courtesy of the corporations, gratuities of their information for public use.

The Commission is granted power to, and is—

Sec. 5. ". . . directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

The mode in which the power is to be exercised is declared in the act, § 5, which provides for the making and service of a complaint, and proceeds—

"The person, partnership, or corporation so complained of shall have the right to appear . . . and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. . . .

"If such person, partnership, or corporation fails or neglects to obey such order of the Commission while the same is in effect, the Commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order,

and shall certify and file with its application a transcript of the entire record in the proceeding, including all testimony taken in the report and order of the Commission. Upon the filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive."

Unlike the jurisdiction of the Commission to investigate, which only includes corporations engaged in commerce, the jurisdiction of the Commission in a proceeding (trial) includes persons and partnerships engaged in commerce, as well as corporations engaged in commerce.

But all parties who may be proceeded against before the Commission are not put on an equal footing before it in all respects. Persons and partnerships proceeded against by the Commission for violations of the anti-trust acts appear before it on a footing of the common law. Corporations proceeded against by the Commission appear before it on a footing of the statute constituted of the Federal Trade Commission acts. The United States must produce its own evidence to prove violation of the anti-trust acts against a person or partnership charged with the violation. The United States is permitted by the statute—the Federal Trade Commission acts—to compel a corporation to produce from itself the evidence to prove its own violation of the anti-trust acts.

The proceeding, although a trial conducted by law to a conclusion in a conviction or an acquittal to the party accused of the crime, is not in the jurisdiction of the judicial power of the United States. The Commission has no judicial power whatever to impose penalties for violations of the anti-trust acts, and no judicial power whatever to enforce any of the orders which it is authorized to make under provisions of the Federal Trade Commission acts.

But the Commission's orders, proceedings, and transcripts of testimony on appeals to the United States circuit court of appeals are nevertheless in that appellate court on equal footing with the orders, proceedings, and transcripts of testimony of the district courts of the United States. And in this connection there is noted another curious difference between cognate provisions of the two Federal Trade Commission acts.

The first of the two acts (No. 203) describes the crime against which "a proceeding" of the Commission would be directed under it (§ 5 above) as "using unfair methods of competition in commerce." The second of the two acts (No. 212) describes the crime against which "a proceeding" of the Commission would be directed under it (§ 11 of No. 212) as "to substantially lessen competition or tend to create a monopoly in any line of commerce" (§§ 2, 3, 7, and 8 of No. 212).

The curious difference referred to is that the jurisdiction of the Commission is exclusive over the crime described as "using unfair methods of competition in commerce," with the effect that "using unfair methods of competition in commerce" is not a crime *per se*, but becomes a crime forthwith on the filing in the circuit court of appeals of the application of the Commission for the enforcement of the Commission's order to the party accused that he desist from the unlawful act against which the proceeding of the Commission was taken, since only thereupon does the judicial power of the United States take jurisdiction; whereas the Commission's jurisdiction of the crime described as "to substantially lessen competition or tend to create a monopoly in any line of commerce" is not made exclusive, but is provided to run concurrent with the jurisdiction of the district courts of the United States, § 15 of the second act (No. 212) providing "that the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act," with the effect that "to substantially lessen competition or tend to create a monopoly in any line of

commerce" is made by the act (No. 212) a crime *per se*, since it is within the jurisdiction of the judicial power forthwith on the accusation being made as provided by law.

The concurrent jurisdiction of the Commission and the district courts of the United States over the last-mentioned crime is not, however, equal jurisdiction. The jurisdiction of the Commission halts before it reaches to the circuit court of appeals of the United States. The Commission concludes its jurisdiction of the original complaint when it makes its report, stating its findings of fact from its proceeding, and thereupon makes its order. Its subsequent application to the circuit court of appeals for the enforcement of its order does not take the original complaint up to that court, but utters a new complaint to the court, *viz.*, that the party defendant, since served with the order of the Commission, has committed the same unlawful acts charged in the original complaint.

But the circuit court of appeals is only given jurisdiction to review the original complaint and the proceeding of the Commission on it, its jurisdiction being defined in the act (No. 203);

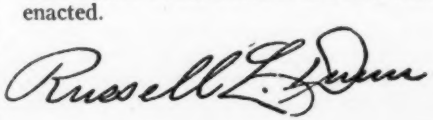
Sec. 5. ". . . Upon such filing of the application and the transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. . . . The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive."

The court is nowhere, in either act, given jurisdiction to sit as a trial court on the new complaint made in the application of the Commission. It therefore appears that the Commission may make its new complaint against the party defendant to the circuit court of appeals, but cannot get into that court to make proof of the charge of the complaint. The Commission is not empowered by the acts to make an application to the district courts of the United States for the enforcement of its orders.

"A proceeding" by the Commission under the authority granted by § 11 of the second of the Federal Trade Commission acts (No. 212) to enforce compliance with §§ 2, 3, 7, and 8 where applicable to commerce, must conclude in a stalemate of the law. "A proceeding" under the same authority by the Federal Reserve Board to enforce compliance with §§ 2, 3, 7, and 8 where applicable to banks, banking associations, and trust companies, and "a proceeding" under the same authority by the Interstate Commerce Commission to enforce compliance with these sections where applicable to common carriers, must likewise conclude in stalemate of the law.

It thus appears that though concurrent jurisdictions of the several Commissions with the district courts of the United States over the crime "to substantially lessen competition or tend to create a monopoly in any line of commerce," and over several other anti-trust acts crimes described in the second of the two Federal Trade Commission acts (No. 212), are provided by this act, the jurisdictions of the Commissions, though of the executive power of the United States, are ineffective and incapable of preventing or restraining the crimes, and that only the district courts, of the judicial power of the United States, are effective and capable to prevent and restrain these certain anti-trust acts crimes.

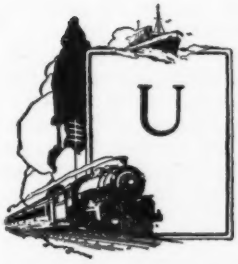
As pointed out above, the jurisdiction of the Federal Trade Commission by "a proceeding" over the crime described as "using unfair methods of competition in commerce" is exclusive. But the jurisdiction halts before it reaches to the circuit court of appeals. And since the judicial power of the United States is not empowered to prevent the crime of "using unfair methods of competition in commerce," the crime may not be prevented at all, which is as it was before the Federal Trade Commission acts were enacted.



Modern Law

BY AXEL TEISEN

Of the Philadelphia Bar



UNTIL about one hundred and twenty-five years ago, all the industries of the world were carried on in an entirely empiric way. The farmer tilled his land in the same manner and grew the same crops, in the same rotation, as his forefathers had done from time immemorial. The fisherman went for the fish to the same places where the experience of prior ages had taught him to look for them, and he used the same kind of boats, tackle, and appliances as his fathers had used before him. The craftsman, in the same manner, simply continued the business of his forefathers on a purely empiric basis. So did the miner, and the carrier.

When any of the men carrying on an industry occasionally introduced something new, an improvement, it was simply because he, by intuition or by accident, had hit upon it.

Organization in the modern sense was unknown, and while the sciences of physics and chemistry had been in existence for ages, and that of geology was developing, still they were to a great extent pure sciences, cultivated more or less for their own sakes, and were not applied.

As a result, the resources of the world were lying idle; there was no proper distribution, no adequate means of communication, and there might be a surplus of the necessaries of life in one place, while there was famine in another, not 200 miles away. A dead level of poverty existed.

Neither was there any advance to speak of. Everything had been put on an established basis. It was no use complaining or kicking; such was life, and man must resign himself to bear it.

Law was equally empirical. It had been established by the fathers, who were wise men, and it moved on along the same old groove. Almost all cases arising fitted exactly in one pigeonhole or another, because conditions of life were and remained uniform; the varieties appearing were not any greater than that a little trimming here and there would fit them for one or another of the compartments.

One advantage attached to this old-world situation was that of steadiness, of security. Of course, a man might squander what he had, neglect his business, but, if he used reasonable prudence and application, he was secure in his position, even if it was that of a beggar. So, in law; the law as such had been so well established, that it was not difficult to apply it to the facts of the case, when these had been once established. For this reason remedial law was mostly concerned about rules of evidence. The object was not, and could not be, to lay all of the facts open and then put the question: What law does apply to this state of facts? The law being such that, the facts given, there was no doubt about the rule applicable, a legal dispute necessarily resolved itself into this problem: The litigant first selected the rule of law he wished to have applied, whereupon he proceeded to make the facts fit this rule, and, in order to do this, he must take care that the other side did not upset his machine by introducing facts which would make his rule of law inapplicable. Hence the rules of evidence.

Innovations were not wanted; they were looked upon with suspicion. Did not most of them resolve themselves into this: Here was a situation, a rule of

conduct, a process of production, having been established for many, many years; by and under which generations had existed and obtained their living; which, in other words, fitted the facts as they existed. And now, here comes a man, setting himself up against all the accumulated wisdom and experience of ages, and pretending that he can do better. "Besser Machen" was not wanted, and often with good reason, because the "Besser Macher" had nothing to support him but his own intuition, and because he failed in application, more often than not. He was a mere theorist.

However, in all conditions of life, it is impossible to remain stationary, and in proportion as all forward movements are repressed, the pent-up impatience becomes stronger and stronger, until one day it cannot be held in any more, and bursts the dam. The latter part of the 18th century was characterized by the so-called benevolent autocracy, which may have been benevolent in intent, but by necessity became more tyrannical than a brutal autocracy, because its foundation was conceit. "We alone know" was its motto.

When man is dissatisfied with existing conditions, he searches for something tangible upon which to put the blame, and he invariably hits upon the law as the cause of his trouble. And laws are comparatively easy to abolish, amend, and enact. When the fathers of the French Revolution had abolished a number of old laws, changed others, and enacted new ones, they actually believed that by this means alone they had established liberty and equality on earth. And as to brotherhood, that they could easily prove would follow as a necessary result; why, when all men were free and equal, they must become brothers; there would be nothing to quarrel about.

The legal machinery for maintaining the old order of things was not everywhere abolished in the same summary way as in France. But everywhere it gave way and was discarded as being worn out, as being but so many impediments. Everywhere, men refused to stay put, and human enterprise received opportunities for free development.

We know what the immediate results were. Machines of all kinds were invented and applied, they superseded human labor, or forced the price of human labor below the minimum on which it was possible to exist. Hence the labor riots in England, Silesia, and other places. In other words, a great chaos ensued, which has not, in all respects, been ended to this day.

But a great work of organization also took place, and is taking place, and this organization was not founded upon experience, but upon reason. All phenomena of nature in the realms of physics, chemistry, and geology were studied down to the minutest details, and from the facts ascertained laws were evolved, or hypotheses set forth. These were then tested by experiments, and, where found true, were introduced into practical life. Man was not any longer dependent upon the experience of himself, or of his immediate predecessors only. The scientific knowledge of the world was put at his command. The economic results were more or less uncertain, because the social problems arising from the new form of production had not been studied in the same way. But these in turn received attention, and while they have not been worked out to a finality, a great part of the road has been traveled. Men are not now ousted from their work by the machines; on the contrary, the machines have created new fields of work, and armies of workers are now employed, where there used to be but battalions. The more organized the production becomes, the better wages it pays. The workers of to-day are many times more comfortable than their predecessors a century ago. The stability and security of the old order were destroyed, and great resultant suffering was caused generations, but even this is disappearing: The fellow-servant rule, the contributory negligence rule, are becoming obsolete; workmen's insurance, old-age pensions, are being introduced everywhere; strict supervision as to sanitation and safety of work places is maintained; those of tender years and feeble bodies are protected against the worst rigors of the system of mass production. The old rules of master and servant are being modified into rules of employer and em-

ployed; the co-operative form of production and of consumption is gaining ground daily; the old theoretic individualism is giving place to a practical individualism, tempered, not by the interests or desires of a monarch or an oligarchy, but by the interests and rights of fellow citizens, of society, of the state.

This change in the world and in man's condition is the direct result of man having cast away the exclusively empiric method. Man has broken away from his fathers. Not in the sense that he has repudiated everything that his fathers did and believed in, but in the sense that he takes nothing on another man's say so. Even the acts and beliefs of his fathers which he instinctively accepts, he wishes to have proved; he cannot be satisfied by taking chances such as his fathers were compelled to take; he does not feel comfortable until the correctness of his acts and beliefs has been made evident to the satisfaction of his own mind.

Man will not now submit to any "categoric imperative" coming from without. Before he will acknowledge it, it must have become self-compelling, in other words, it must proceed from within. This change is often expressed in saying that reason has superseded authority, but that does not express the change correctly. It would be better to say that conscience has taken the place of authority as the living principle of the age. For the change has taken place in almost all spheres of life, spiritual as well as material. When a Christian nowadays accepts certain teachings of Saint Peter, Saint Paul, Saint Augustine, or any other religious teacher, he does so, not on account of the authority of the author, but because the teaching agrees with his own spiritual conceptions, and, having accepted the teaching, it is entirely immaterial to him, whether it first was promulgated by Peter, Paul, Augustine, or anybody else. What matters to him is that the teaching is true, and, whether it is true or false, he determines in the depth of his own heart and conscience, and not by citations from Apostles, bishops, or saints. To modern man, any given religion must justify itself by its contents, and not by the authority of its creators, or their successors.

Medicine, mathematics, physics, chemistry, and all other sciences proceed in the same manner. No saying of any ancient physician, astronomer, physicist, etc., is accepted at its face value; its value must be proved. The proof of the pudding lies in the eating, and the proof in all science, yea in all human endeavor, lies in the application. If the saying does not work out as it was intended to work, as it was promised to work, it is at once discarded, without regard to its author.

But, while it is comparatively easy to introduce a new machine in the place of one less efficient, or a new chemical formula for an old one less good, it is many, many times more difficult, in the realm of religious and social relations, to make people accept a new truth and discard one to which they have been attached for ages. And the reasons are twofold. Truth in these realms cannot be demonstrated as in physical matters. A physical or chemical experiment can be completed within days or months, while a religious or social experiment cannot be worked to conclusion in less than a generation. The inertia in man's mind repels him from undertakings of which he will not see the end. Also, all accepted truths in matters of mind have been reached only after long struggles. Sacrifices of war, blood, and suffering have been made in order to reach them. They have been dearly bought, and are not lightly discarded. Man does not wish to become instrumental in having sacrifices of what is dearest to the race appear to have been made in vain, even if the actual sacrifice was made, not by him but, by former generations. He feels that by the sacrifices of his fathers he has been placed on ground which, even if not absolutely secure, still offers him a foothold and support; he does not wish to be thrown back into chaos.

And man is so much more reluctant in agreeing to new proposals in religion, morals, and law, because so many "cure-alls" have, from time to time, been proposed and have failed, if not at once, then after a short time, the reason for which has invariably been, that there is no true "cure-all" to be found anywhere.

What have appeared as cure-alls have been nothing but scholastic systems built upon certain assumed universal conditions of fact and carried to their ultimate conclusions by reasoning only. The least flaw in the assumed foundation, the least spoke in the wheel of logic, have always been sufficient to upset the whole vehicle.

Man knows that the now prevailing doctrines, forms, and practices in religion, morals, and law, were originated and shaped under conditions entirely different from those prevailing to-day, and that a great many of them do in no way fit in with modern man's outlook upon life. He puts up with them, however, because he has nothing to take their places, and because he is able to work and use them, even if it entails a great amount of waste.

The result is that law is still in the empirical stage. The change in the practical world from simple empirism to scientifically reasoned system has not left the law untouched, but only in so far as it has created a mass of new problems for the law to deal with. Some of these problems have been taken up by the legislative powers, and a solution of them in this way has been tried, but jurisprudence as a whole, or as a science, has been left untouched. Whenever they are dealt with, they are handled in the old empirical way. How near does this phenomenon come to one which was known before? What is the nearest analogy? And when this has been determined, the next question is: What rule did Judge Hare or Lord Hardwick or Blackstone or Lord Mansfield, or some other ancient, lay down for such a set of facts? In other words, how did my father or grandfather act when they were in a similar situation? I have the greatest veneration for them and for their wisdom; I must do as they did. Man forgets the difference between being wise, and being wise in one's age and generation.

The most remarkable rules of law have been engendered and propagated in this way; *instar omnium,* the fellow-servant and the assumption of risk rules. The rules of evidence, as we now know them, come down to us from the time when the change in the world commenced to take place. You could not apply the old rules of law, if you allowed all the new facts to be made known; the law could not be made to fit them—*ergo,* they must be excluded.

When a new dispensation came into the world in Christianity, it took man centuries to work it out and to free himself from the traditions of the old dispensations, whether Jewish, Greek, or Roman. A similar struggle is going on now; the rules built up by ages of empiricism continue to hold sway, even if they can show no sound reason for their continuation, yea, even when they can be positively shown to be unreasonable in their effects. And as long as this struggle goes on, the most curious incongruities crop up and are perpetuated.

In his essay on Criminal Procedure, Select Essays II. p. 467 etc., Stephen relates how, until 11 & 12 Vict. chap. 42, § 27 (1849), the man accused of crime was not entitled to know the evidence the Crown intended to introduce against him, and illustrates his narrative by referring to the case of Rex v. John Thurtell (1823), which was a murder case. In his charge to the grand jury, Justice Park said that the constant course was to transmit the depositions taken before the committing magistrate to the judge, taking care that the accused should not have an opportunity of seeing them; the prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence, if the latter had access to them? Why, that he would know everything which was to be produced in evidence against him, an advantage which it was never intended should be extended towards him.

By the cited act, however, accused became entitled to a copy of the depositions, and this act works for the benefit of all indicted persons, even if the punishment cannot exceed a fine.

In other words, it was agreed to be unfair to take a man by surprise in a case in which he was interested.

But in civil cases, it is still the rule that while the pleadings must contain all of the facts (corresponding to the indictment) they must not contain the evi-

dence, and this has been reiterated as lately as in the Pennsylvania practice act of 1915.

So that, if a man is indicted for slander, or for some other more or less trivial offense, he is entitled to know the evidence against him before he goes to trial, but if a civil action is brought against him which, if successful, will ruin him for life, then he is left to his guessing powers, and to the hazards of surprises.

War cannot be made fair, for if so made it would defeat its own purposes, and would cease to be war. According to high authority, war is hell, but nobody has ever accused hell of being fair.

In 1849 the Parliament of England agreed that the prosecution of indicted persons should be conducted, not on the principles of war, but on those of fairness.

In 1915 the legislature of Pennsylvania ordered that civil trials shall still be conducted on the principles of war and by means of ambuscades, cutting of wires, interception of information, and all other *ruses de guerre*.

The trouble is that the fundamental work done in all of the exact sciences, so as to fit them for the new dispensation, has not been done in law, or has been inadequately done, or, even where adequately done, has not been recognized as it deserves. In his Criminal Psychology (Little, Brown, & Co., Boston, 1911) Dr. Hans Gross severely arraigns the lawyers for having allowed their profession and their science to lag behind, until they are, more or less, like the quacks of the medical profession of former days, trusting in formulas and scholastic doctrines, relying upon more or less authenticated observations of a few men of former generations, instead of opening their eyes and seeing for themselves.

As a result, law has become the greatest casuistry; teaching law on the case-method has become the acknowledged best way of imparting knowledge thereof; there are practically no acknowledged principles of law or rules for their application. Have you any cases in support of your contention, is the invariable question from the bench to the bar. And if your answer is, "Yes," then the direction: Let me have a brief of them. The same old story: What did father do in such a case? If he did so or so, I will do the same, and by following this authority, I wash my hands of any wrong that may be committed.

What is needed is an all-embracing re-examination of all of the fundamentals of law. Not in the style of the old naturalists who set up one or a few moral maxims from which they deduced logical rules for everything between heaven and earth. While all honor is due them for instigating legislatures and courts to try to do right, their systems all collapsed in the first storm, because their foundations were sand.

To undertake such a re-examination is a tremendous task, because it must be built on facts and knowledge of facts. The men who undertake it must know at least the conclusions of all other sciences, and of some they must be familiar with their processes. They must be intimately familiar with both the legal and general history, not only of their own nation, but of the whole of the white race. They must know the main currents of their own age, in literature, in politics, in philosophy, in religion.

Some few men have undertaken such a re-examination, in whole or in part. They have received very little reward, first because men have been apt, without making a thorough examination of their works, to classify them among the old-time philosophies of Law; also, because the conclusions such men have drawn from their examinations are, as a matter of fact and of necessity, but personal opinions, and men have not been weaned from the old idea that in a "system" of philosophy it is the theses, the results, that count. But this is an error. The value lies in the accumulation of accurate facts, in their correlation, in the weighing of their relative value, in the development of their nature and place in the whole of human society; in other words, in the production of a solid, accurate, and all-embracing basis of facts, from which the legal conclusions may be drawn.

It is practically beyond one man's power to accomplish such a task, and, if ac-

complished, the result is apt to be more or less lopsided according to the special idiosyncrasies of the individual.

In order to reach satisfactory results, there must be co-operation. But where can be found the requisite number of men, not only competent, but also both able and willing, to give the enormous amount of labor and time involved?

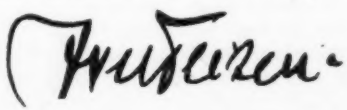
Hitherto, no practical way has been found but the official appointment of Commissions. This was the way Justinian followed, when he had ordered the law of his Empire to be restated, and this has been the way along which most modern codifications have been accomplished. Much excellent work has been done in this way, but also a great deal rather poor. When, in modern times, such restatements and codifications were first undertaken, it was customary to appoint one man, with the necessary assistants, to do the work; the results were reached rather quickly, there was good systematic order in the statement, but it was generally very one-sided, did not give satisfaction, and had to be constantly amended. In the following time, it became the fashion to appoint very large Commissions, with the result that the statements came to lack clearness and precision, as vague statements were the utmost the Commission could agree upon. In many cases, it was found necessary to dissolve the Commission, because it had shown itself unable to agree at all. Next, it was tried to appoint a number of Commissions, each to deal with separate, narrow subjects. It was not uncommonly found that the statements of the various Commissions differed so much in fundamental principles that, if all of them should be adopted as law, nothing but confusion could follow.

Of late years a different method has been adopted which appears to have had satisfactory results. This method can be best explained by relating what has been done in Germany, in order to obtain a new Criminal Code.

A so-called scientific Commission was first appointed, consisting mostly of university professors, with the object of making a comparative study of the criminal laws of the world. The result of their labors was published in 1909. In the meantime another Commission, consisting mostly of judges, had been appointed to prepare a tentative draft of a code. This draft was also published in 1909. For two years nothing more was done officially, but criticisms of the published draft were invited and made, even to the extent that four well-known jurists prepared and published a counter-draft. Then, in 1911, the government appointed a very numerous Commission, for the purpose of preparing a new draft upon the basis of the information gathered, the already prepared drafts, and the criticisms thereof. The Commission divided itself into sections, each taking up a special field, but these kept in constant touch with each other, and with the whole Commission; the latter held 282 plenary meetings between April 1911 and September 1913, besides six final meetings for text revision. By this time, more than seven years had elapsed since the initial steps were taken, and even then the "motives" of the Commission, that is, the arguments in favor of their proposals, had not been put into final form. After the steps enumerated, there would follow a final revision in the ministry of justice, the introduction thereof as a bill in the Reichstag, and its final passage there (possibly with amendments). But so far, the war has prevented the work from being finished.

The German and the Swiss Civil Codes, and a number of smaller codifications in these and other countries, are the results of similar methods, and a number of Commissions have made reports, without their reports having been elevated into law.

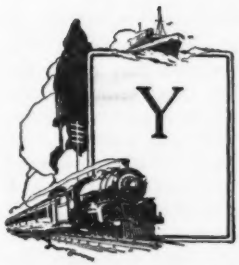
As will be easily seen, this method is cumbersome, slow, and expensive. But, as what is wanted is a restatement of the law in accordance with present conditions of fact, weighing and satisfying as far as possible all interest, deciding which are legitimate and which are not, as well as their proper proportions, haste cannot be recommended. If done hastily, the work will have to be done all over again.



A Deal In Futures

BY REYNELLE G. E. CORNISH

Of the Portland (Ore.) Bar



YOUNG Denton always made it a point to get down to the office early; but this morning there was someone before him.

"Good Morning!" Denton studied the huddled figure in the familiar brown gingham, intently. "Why, Tillie! How do you do! It has been a long time since we have seen you!"

The figure straightened its bent shoulders briskly. "Why, it's Master Jack! Who'd have thought it was fifteen years ago, I was a workin' at your house, and you was a teasin' me to have waffles every mornin' in the week!"

"Um," remembered Denton, vividly. "Those were good waffles—I haven't had any like them since, Tillie."

"I'd a been makin' them for you yet," explained Tillie simply, "I allus gived satisfaction. Only, when your pa got to be judge for that spell, awhile back, I wasn't stylish enough to open the front door. So your ma got a new maid, an' I've been a workin' down to Old Man Meeker's what aint got no style at all, ever since,—and now he's dead!"

"I'm sorry," Denton hastened to change a subject that seemed to border on sensitive ground. "And what can I do for you this morning, Tillie?"

The black cotton gloves shifted suddenly over a small box, half hidden in the gingham lap of its caretaker. "Nothin'," said Tillie, with calm politeness, "I'm a waitin' for your pa,—on important business."

Young Denton withdrew to his private office, smiling over his own discomfiture. Tillie, with quite unconscious candor, had put him back in the small-boy class of fifteen years before. "I don't believe she even noticed that I have on long trousers," he reflected ruefully as he glanced over his mail, and then settled to the finishing of an important brief.

Presently Tillie was ushered into the private office next to his own. Evidently the Judge had arrived. The rise and fall of their voices came to Denton through the separating partition. It was an unusually long conference, and the Judge's time was valuable. Denton, applying himself conscientiously to the dry work before him, found his thoughts wandering, and the moment that the murmurs ceased he threw open his door for the customary exchange of morning greetings, with unusual alacrity.

"Good morning, son!" the older man was frowning thoughtfully at an inoffensive black box in the center of his desk. "Come in. Did you see Tillie?"

"Yes, sir, she was here when I came in. She politely declined to intrust her momentous affairs to my immature keeping; but I surmised from her secretive air that her late employer had died and left her a fortune."

"Well, not quite!" The Judge frowned again in the midst of a smile. "Tillie is like a good many other worthy and economical people, who would rather consult a lawyer afterwards than before. And so it happens that she has missed $25,000 by the stroke of a pen. Look at this will, Jack!"

Denton read the scrawling sheet carefully. It was dated April 1, 1900, and bequeathed, in the most exact and elaborate phraseology, all of the worldly goods, real and personal, of the testator, James Meeker, to his worthy housekeeper and employee, Tillie Jenkins. It was properly witnessed by two disinterested witnesses.

The flaw was such an obvious one that Denton, in his microscopic examination,

came near overlooking it. "Why!" he exclaimed, "it isn't signed!"

"Exactly!" agreed the Judge. "A small defect, but a fatal one!"

"It's a shame, father—how are you going to get around it?"

The older man laughed outright. "You sound like Tillie. When I broke the news to her that this purported will was null and void, she just settled calmly back, and said,'Well I'm glad I came to you in the first place, Judge, now that there's some fixin' to be done.'

"Poor Tillie! We should have looked after her better. She served us faithfully for years,—far better than all these new fangled maids, your mother prefers, we have had since—and then she went to Meeker's. Meeker cut down her wages to $1.50 a week to begin with, on the plea that times were hard, and then, hating to see those three precious half dollars leave his hoard every week, he finally got her to agree to work for him for nothing until he died, on his promise to make a will in her favor. Tillie agreed,—and this is the will.

"It makes Tillie his sole heir and legatee, just as he promised, but it isn't worth the paper it is written on, in a court of law. And Tillie has worked for fifteen long years, with this as her reward!

"She was so careful to have it put in writing and properly witnessed, and she doesn't see why the will isn't good even if it isn't signed, when Old Man Meeker wrote it himself.

"It's a shame of course, but a hopeless case!

"I advised Tillie that we could put in a claim against the estate for services rendered, but she refused to listen to any compromise, and flounced out in a huff to find another lawyer.

"Just keep an eye on the matter, will you, son, and see that she doesn't come to grief in the hands of some shyster. She has left her papers here, so she will probably listen to reason, in time.

"Now, what is the next matter at hand! Oh, yes, the demurrer in that Neilson case . . ."

The next month was unusually rushed, but Denton found time to keep track of Tillie's troubles. Jim Meeker's estate went into the probate court, and a Miss Harriet Haynes, of Tecumset, Maine, applied to be appointed administratrix, as the next of kin. And then one night the town paper came out with headlines, —SERVANT PREVENTS ENTRANCE OF LAWFUL HEIR,—DEFIES THE LAW AND THE COURTS,—POLICE AT BAY! The Star had a new reporter who believed in playing up the news for all it was worth.

It was hard to believe that meek old Tillie had been the inspiration of the thrilling headlines, but, simmered down, the facts were about as follows: It seemed that Miss Harriet Haynes, armed with her authority as administratrix, had attempted to take forcible possession of the Meeker home, as the lawful heir. Tillie, in possession, had slammed the door in the intruder's face, and had threatened to defend her fortress with broom and scrubbing brush, to the last ditch.

Miss Haynes, retiring for reinforcements, had procured the support of the sheriff, a sandy-haired, undersized man, with a mild blue eye, who was on his way home to supper. The sheriff, stepping out briskly at the phrases, "unlawful trespass," had stopped short when he discovered that the unlawful trespasser was his old friend and neighbor Tillie, and had refused to be inveigled any further than the sidewalk; but, instead, had tried to settle the dispute by shouting suggestions and compromises across the two hundred feet of lawn. That had supplied the "POLICE AT BAY" headline.

Tillie had replied to threats and entreaties with the impenetrable silence of barred doors and drawn window shades, and the sheriff's voice proving unequal to the severe strain put upon it, Miss Haynes had been forced to abandon her position until she could consult her attorneys and "put the law on that awful woman!"

Young Denton read the article aloud to his wife, and it seemed excruciatingly funny, but somehow after he had gone to bed, the thought of the poor old woman, alone on guard in that desolate house, kept him awake.

The next morning, before he could talk

the matter over with the Judge, as he had planned, the telephone rang.

"Mr. Garret, of Garret & Hay, would like to speak with Judge Denton—Oh, is that you Jack? This is Jim Garret.—Yes, you will do.

"We are the attorneys for Miss Harriet Haynes. Miss Tillie Jenkins has referred us to you as her lawyers.—Oh, yes, some write up, wasn't it—just like two fool women! But, look here, Jack, we want to get together on this. Of course, it is a shame about Tillie. Everybody is sorry for her. It was just like that old skinflint, to do her out of it. He couldn't do a straight thing if he tried. If I saw a chance for Tillie I wouldn't have taken this case against her. But there is only one side to this affair. We lawyers don't make the law, unfortunately.

"I have advised my client as to her rights in this matter; but I have also suggested that she be as generous as she can with Tillie. She is anxious to do the square thing, although of course she was rather angry over the treatment she received yesterday. She has agreed to pay Tillie her back wages, with interest, refund any actual disbursements on behalf of Meeker, and she will give her $500 extra in cash if she will leave the house quietly, at once, and not give any more trouble in the matter.

"I have tried to talk to Tillie, but she refuses to listen to reason, and insists on claiming the property under that absurd unsigned will of hers. She said she didn't have any attorney at first, but she ended by referring me to the Judge. Will you see her as soon as you can, and let me know? I can't hold that offer open any longer than to-night."

The Judge was busy with a directors' meeting, but he paused long enough to hear the message. "Good," he exclaimed. "You go over and tell Tillie to accept it. There is no use in phoning her to come here, I know she won't stir from that house. But this is undoubtedly the best settlement she can hope to get, and she ought to take it up before Garret & Hay's client changes her mind!"

The Meeker house was situated on the outskirts of town. It was a rattling old shell of a place, with a Queen Anne front and a tin-car rear, and a general air of having seen better days. All the shades were closely drawn, and the pounding of the heavy knocker brought no response. But Denton noticed that the porch was still shining from a recent scrubbing.

"Tillie," he called softly, "Tillie," and then despairing of making an ordinary voice reach through the massive, paneled door, he cupped his hands over his mouth and gave the familiar ear-piercing yodel of his younger days! "Whoo-ee, Tillie," he called.

The door swung slowly open on its hinges. "S-sh Master Jack, I heered you the first time, but I had to make sure."

Denton squeezed through the narrow aperture that was cautiously opened for him, into the long hall. The door was fortified by a collection of heavy kitchen chairs, piled crosswise against it, and reinforced with the huge dining room table.

The solitary defender of this beleagured castle double locked the door, slipped the guard chain into its socket, and piled her barricade carefully back into place, before she spoke a word. Then she faced her caller.

"I knowed you'd come," she said triumphantly. "Is your pa agoin' to fix things for me?'

Her assurance was disconcerting. "Well, it's like this, Tillie," Denton was hesitating over the words. "You know that will isn't signed, so it makes it absolutely worthless in the eyes of the court, and not even father, much as he would like to, can get this house for you. The law gives it to Miss Haynes, and she has the right to take possession of it, and we can't any of us, prevent it. But she is anxious to do the fair thing by you, and so she has offered to pay you your back wages, with interest, repay you for any expenditures you have made for the house or for Mr. Meeker during his illness, and give you $500 in addition, provided you will leave the premises quietly and at once, and not give any more trouble.

"Father advises you to take it, and wished me to see you about closing the matter up to-day,—if that is satisfactory to you?"

A stubborn shake of the head was his auditor's only answer.

Denton began to lose patience. "Be sensible, Tillie," he argued. "What is the use of throwing away $500, just because you can't get more?"

Two slow tears gathered underneath the wrinkled lids and rolled down the drawn face. Tillie wiped them away wearily with the corner of her twisted apron. "You don't need to talk to me, Master Jack. Don't you suppose I know I'm an old fool, lockin' the door 'gainst rightful owners, and tryin' to fight officers of the law, and makin' myself a laughin' stock for the neighbors!

"I knowed all along, when your pa, the Judge, said I couldn't have it, there wasn't no use in tryin'. I said I was goin' to see another lawyer, but I was just talkin'. It aint that, Master Jack,—but you just wouldn't understan'. It's because I can't help it! I've been workin' here for fifteen years, a scrubbing the floor, and sweepin' the porches and washin' the windows, and all the time I've been a thinkin', 'You're a goin' to be my house, some day!' I've been sayin' it so long that it just seems like I've got to have it.

"I never laid claim to own nothin' before, except the clothes on my back and the savings I've been keepin' in an old stockin' against the time I get to be too old to work, and now,—well, there aint nothin' left for me to live for!"

The young attorney's heart ached for her. "It is a shame, Tillie! You should have come to dad at once, and he would have made sure that the papers were in proper form, and that you were protected. All the right and justice are on your side, but the law is with the other fellow."

"It looks like it ought to be easy," said Tillie wistfully and from the depths of her ignorance. "It looks like it ought to be easy, when the right's all on our side, an' only the law's against us!"

She leaned heavily against the oaken door, a tired old woman in faded brown gingham, opposing the flimsy barricade of her "rights" to the unbending majesty of the law."

All the chivalry of Denton's nature sprang to champion her unequal cause.

"Tillie," he said, "You know I haven't been practising very long, and if there had been any feasible remedy, it seems likely that father would have known about it,—but if you want to hold this matter open until to-morrow, I'll go over it again, and see if there isn't something to be done."

Tillie nodded dubiously. "I aint a goin' to compromise, no how," she declared. "But I wished it was your pa a sayin' that! Not that you aint smart for your age, an' all that, Master Jack,—but there's some awful knowin' lawyers against you."

Her volunteer champion laughed, undismayed. "Well," he argued sensibly, "If you wont compromise, we'll have to fight, and maybe I'm smarter than I look, Tillie!"

Young Denton's enthusiasm lasted until he reached the sober atmosphere of the office, and then it began to ooze rapidly away.

He was glad that the Judge was not in to question him, as he gathered up an armful of authorities on wills, and retired hastily to the unused cubbyhole of a back office that was his favorite retreat in time of trouble.

"Now, how the dickens," he exclaimed helplessly, glaring at the brown-covered volumes whose decisions he already knew by heart, "How the dickens am I going to set to work to prove an unsigned will?"

It was 6 o'clock when the Judge looked into the room, on his way home.

"Why, hello, Jack, are you here yet!" Garret & Hay have been keeping our wires hot all afternoon. Did you see Tillie, and fix things up with her?"

The young man's eyes twinkled. "I saw her all right, dad,—and I'm afraid you will think she fixed me. She has her flag nailed to the mast, and she wont haul it down. Compromise is not in her vocabulary, and before I got away she made me promise to fight it out for her.

"I've been trying to get a line on some possible procedure before I broke the news to you."

"My dear boy," began the Judge impatiently. Then he restrained himself. "What line are you trying to tackle?"

"Well I'm up a tree, yet," Denton ac-

knowledged frankly, "But the right is all on our side, dad, and that is a good beginning, you must admit. Meeker plainly intended to give everything to her, —there wouldn't be any question about that. Tillie's word counts for a good deal, and both of these witnesses are unimpeachable. And the will itself is in Old Man Meeker's handwriting, even if it isn't signed."

"Oh, fiddlesticks," the Judge's patience was straining. "Don't call that useless document a will. Haven't you seen enough estates handled in this office to know that the probate court is one of the most technical branches of the law? To find a flaw in a will is easy, but to mend one, flawed in the making, is a legal impossibility. And an unsigned will has no more standing in a court of law than a piece of blank paper."

The younger man flushed, and his father's voice softened. "I know it is hard, son; but we lawyers do not always make the law, and, public opinion to the contrary, we cannot always bend it to suit our needs. Better give it up and come along home, son. It's a wise lawyer who knows when he is beaten!"

Denton shook his head stubbornly, "I'm going to stick it out a while longer," he decided finally, but after the Judge's footsteps had died away along the corridor, he sat staring at the blank wall.

He knew in his heart that the Judge was right. He had realized that the authorities were dead against him, before he opened a book.

And still—Denton smiled a little as he remembered Tillie's wistful words. "It ought to be easy, with all the right on our side, and only the law against us!"

"I wonder,—" Denton speculated idly. "By Jove! I believe I have it!" An impatient turn of his swivel chair swept a flurry of books and papers from his overcrowded desk, but Denton disregarded the confusion. Suddenly alert, on a new scent, he was searching the revolving bookcase at his elbow for a certain dog-eared volume of his school days.

The room grew silent as, with the simple key before him, Denton went over the facts of his case again.

"Well, it isn't perfect," he acknowledged hopefully, at length. "But, except for one bad leak, I think we can make it hold. I'll get dad to go over it in the morning."

But the morning found the office in confusion. The Judge had received a telegraphic despatch calling him East on important business, and the few hours at his command were spent in an effort to arrange matters more important than Tillie's paltry $25,000. Before Denton could collect his thoughts, Garret & Hay were on the phone for their answer.

Jim Garret's voice went through all the shades of amazement, indignation, and disgust, "What, not take that settlement, after I worked so hard to get it for Tillie! You don't expect me to raise that offer do you?—You don't know my client!"

Denton laughed. "Don't waste your time, Garret, we've decided to fight."

"But, man alive, you haven't any case. . . ."

"Oh, I don't know about that," objected Denton airly, "We've got a very good looking document here, it seems to me, barring the absence of one unimportant signature, and—where there's a will, there's a way, you know."

"All right," scolded Garret, incensed, "If you want to be funny—but I warn you that we wont repeat that offer, and we will have to commence proceedings against your client at once."

"Go ahead," agreed Denton, good naturedly. "Only make it fast, Jim, for we are thinking of starting something ourselves."

The papers in the ejectment suit of Haynes vs. Jenkins were served before noon. Denton responded promptly by filing a cross bill in equity, asking for specific performance of a contract to make a will, entered into between Tillie and Meeker, "on or about the 1st day of April, 1900," and praying that the court compel the heir, upon whom the legal title to Meeker's property had descended, to convey or deliver the property in accordance with the terms of such agreement, upon the ground that it was charged with a trust in the hands of the heir.

The case came on for trial with that amazing celerity which is sometimes achieved when all parties wish it. The

Judge was still detained in the East, and Denton, now that matters had proceeded so far, was hoping that he would stay there until the case was finished.

Time had only made him the more confident of his points, and the office was so rushed in his father's absence that he went to trial without having an opportunity to bolster up the one serious weak point that he had noted. "The chances are against their locating that spot, anyway," he decided, taking a chance, after the immemorial custom of lawyers.

The case proceeded much as he had expected.

Tillie was called as the first witness, and the moment that her attorney tried to question her as to Meeker's promise to make a will in her favor, Garret, for the defense, was on his feet.

"We object to the admission of this testimony on the ground that it is incompetent, immaterial, and irrelevant, and inadmissible under the statute of frauds, first, because it is offered for the purpose of proving a parol contract which is not to be performed within a year, and, secondly, because it relates to a parol contract for the sale of an interest in lands."

Denton rose promptly, "If it please the Court, we expect to show that this agreement does not come within the statute of frauds."

The Judge nodded, "I will note the objection of the defense to this entire line of testimony, and will overrule it. The testimony will be admitted subject to its being properly connected up."

The trial proceeded. Tillie testified simply, but to the point, in regard to the agreement she and Old Jim Meeker had entered into, and which Jim, in accordance with his agreement, had later incorporated in the paper he had intended to be a will. The two witnesses to the void document corroborated the story in every essential detail. Old Meeker, overjoyed at the prospect of saving Tillie's wages every week, had gleefully reiterated the terms of the agreement over and over again, until even the rather stupid brains of the two farm hands had been indelibly impressed with it.

Denton, believing that, other things being equal, the briefer the witness the stronger the case, kept his witnesses on the stand only long enough to obtain the bare outline of the facts that constituted his case, first, in regard to the making of the contract, and, secondly, that the plaintiff had carried out her part of the contract, faithfully, in every particular.

Garret waived cross-examination—he was not making this fight over the facts of the case, but on the law.

When Denton finally rested his case, counsel for the defense arose triumphantly. "At this time, if the Court please, we move that the cross-complaint be dismissed for the reasons stated in our objections to the admission of all the testimony in this case. It is clearly within the statute of frauds."

Denton's confident air was a match for his opponent. "My opponent's points are well taken," he admitted kindly, "but he overlooks the one fact that takes this case out of the statute of frauds, namely, that in this case the *promisee has fully performed the consideration.* This suit is brought in equity, and where, as in this case, the promisee has fully performed her part of the agreement, equity will intervene to prevent a fraud upon the promisee, and will enforce the terms of the agreement, though such agreement be by parol, and, as such, originally within the statute of frauds.

"In Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, 778, this point is clearly explained. Here the court says, in speaking of the agreement in the case, 'It is said that this agreement was in parol, and is therefore contrary to the statute of frauds. But although this agreement was a mere parol one, if there was a part performance of it, of such a character as, upon the principles recognized and acted upon by this court, will take a parol agreement out of the statute; then there is nothing peculiar about an agreement of this kind, to exclude it from the operation of these principles.'[1]

[1] Davies v. Cheadle, 31 Wash. 173, 71 Pac. 728; Harrison v. Harrison, 80 Neb. 107, 113 N. W. 1042; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Updike v. Ten Broeck, 32 N. J. L. 105; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Note in 14 L.R.A. 860.

"And it is an established doctrine of equity, that where a verbal contract has been performed, in whole or in part, upon one side, so that he who has performed cannot be replaced in his former position, or adequately compensated for the injury he has suffered, in his behalf, equity will decree the specific execution of the contract.

"The foundation upon which this doctrine rests is the prevention of a fraud upon him who performs." [2]

"The motion is denied," ruled the Court. "The testimony is clearly admissible under the decisions."

Garret sat down heavily, then he rose and cleared his throat. "I'd like to ask for an adjournment of this case on the ground of surprise," he began weakly.

The Court shook its grey head. "These authorities were open for your persual, as well as to your opponent,"—he began sternly, and then relented at the hopeless look on the crushed attorney's face. "However, it is now 12 o'clock, and the Court is ready to take a recess for lunch. If you are prepared to proceed with the defense, we will continue at 1 o'clock."

Young Denton stopped at his office only long enough to look over his personal mail. There was a night letter from the Judge announcing his expected arrival the next morning, and instructing his son to hold over all trial cases until his return.

Denton chuckled over that. "It's all over but the shouting, right now," he congratulated himself, as he enjoyed a leisurely luncheon at the one aristocratic club in town. He was laughing, inwardly, at the thought of the frantic hour Garret would be spending in a vain effort to rehabilitate his lost case.

He went back to the Court in fine spirits, ready to receive the decree on a silver platter,—and found that the enemy had obtained unexpected reinforcements. By Garret's side at the counsel table sat no less a personage than J. Mead Lawton. Lawton had been one of the most brilliant trial lawyers of his time, but he was practically retired now, and it was an extraordinary case that could bring him out.

Denton's cup of joy curdled at the sight of him. For the first time he wished that he had held off the trial until his father's return.

We are ready to proceed with the defense," announced Lawton confidently. Evidently he intended to take charge. "And we will call as our first witness Jud Wilkens." Jud was one of the two farm hands who had witnessed the will.

Denton held his breath. If he had counted on his opponents overlooking any weaknesses in his case, the first few questions disabused him of any such vain hope. Lawton's brilliant intellect had seen the exposed spot at once. And he was bending all his energies to prove that this was a case for money damages, rather than for specific performance, and that the measure of money damages was equal to the compensation which Tillie had given up, plus her actual cash expenditures in Mr. Meeker's behalf.

It was a fine point, but a good one, and Lawton knew how to make the most of it.

One by one he called Denton's witnesses to the stand, and proceeded to bring out clearly his point. The witnesses, simple country people, that they were, fell easily into the trap. Anxious to point out Tillie's good qualities, they were only too willing to testify, as to her faithfulness, industry, and capability.—Yes, she had been just as good and faithful and hardworking; she had done as much, scrubbed as hard, and had been in all ways as good a servant, whether she was working for $1.50 a week, or under the proposed expectation of getting a fortune.

Denton, perceiving the dangerous twist to these apparently innocent questions, tried frantically to stem the tide by cross-examination, and only succeeded in muddling matters.—Why, yes, they thought $1.50 a week was a pretty fair wage for household servants. Why, no, they didn't think Tillie had been imposed on,—they reckoned she was getting

[2] Clancy v. Flusky, 187 Ill. 605, 58 N. E. 594, 52 L.R.A. 277; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; Note in 15 L.R.A.(N.S.) 466; Pflugar v. Pultz, 43 N. J. Eq. 440, 11 Atl. 123; 6 Pom. Eq. Jur. § 746; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455.

pretty near what she was worth.—Times were hard all over—everybody had had their wages cut.

"That's all," said Denton, in baffled chagrin. Lawton was frankly enjoying his discomfiture.

Tillie, confused by the turn of affairs, was even worse.

Denton had always held to the belief that only a tricky lawyer was guilty of "coaching" a witness; now he realized that a witness who is strange to court routine has a humane right to a few words of advice and admonition. Lawton was a skilled fencer, and he fought with the buttons off, while Tillie had never even seen the foils before.

She could not understand how the other side could make her their witness without forcing her to be a traitor to her own cause. She refused at first to speak a word, and when the Court had forced her, under threat of punishment for contempt, to answer, she lost her head completely.

Denton's efforts to protect her from leading or improper questions, by raising objections, and the Court's rulings, completed her confusion. By the time she was allowed to answer a question, she had forgotten what it was, and while the Court and Tillie and Denton were losing their tempers in the mix-up, Lawton was patiently completing his chain of evidence, and driving his points home.

"And so," he finished calmly at length, "you testify that you have always been a faithful servant, both before and after this alleged contract; that before the making of this contract you were receiving $1.50 a week from Mr. Meeker for your services; that you were satisfied with that amount and considered it all that you were worth, but that at Mr. Meeker's request you gave up this $1.50 a week in order to enjoy a fortune of $25,000, when he was dead. Is that correct?"

"Yes, mam," said Tillie sullenly.

"I object to the asking of these leading questions," thundered Denton desperately.

"Objection sustained—strike out question and answer," ruled the Court wearily.

Lawton smiled blandly. Having impressed the answer he desired on Tillie's dazed mind, he was quite willing to change the form.

"I withdraw that question, and ask you instead, this one. What did you give up at Mr. Meeker's request, in order to obtain a fortune of $25,000.00?"

"A dollar and a half a week," repeated Tillie, parrot wise.

"Ah, a dollar and a half a week for a fortune of $25,000! Well, now, that was not such a bad bargain, was it?" commented Lawton nonchalantly.

A titter went around the crowded court-room. Tillie's case was lost.

"And is that-er—small sum of $1.50 per week *all* you gave up for this considerable fortune of $25,000?" persisted Lawton, clinching the point Tillie's answer had so deftly driven home.

"Yes m'm," agreed Tillie, wearily, "Yes m'm, that's all—that—an' fifteen years."

"What's that?" shouted Lawton, jumping to his feet. "What do you mean by that?"

"Gently," reminded the Court. "This is your own witness—don't try to intimidate her.

"Now, then, Miss Tillie, just take your time and tell us in your own words what you mean."

So Tillie told her story again. Almost as barren of detail as when Denton's brief, too impersonal questions had elicited it, almost as incoherent as when Lawton's clever inferences had twisted and distorted it, the dull, uninteresting story drew to its meager close. And yet, somehow, a new note had been struck in the telling! And the Court, listening this time, instead of dozing, forgot, for the moment, the lowliness of Tillie's services, and remembered only her faithfulness. Fifteen years at hard labor,— fifteen years of patient toil,—fifteen years of waiting and hoping for an uncertain reward—

There was a soft clearing of throats in the room.

The defense hastily rested its case; like many another admirable defense, it had been spoiled by just one question too many.

"Will counsel waive argument?" began the Court.

Denton nodded. Tillie had pleaded her own case, beyond the ability of any mere lawyer to add or detract.

But Lawton sprang angrily to his feet. "If it please your Honor, I desire to address the Court. The testimony of this witness has made a sentimental appeal to us all. But this is a court of law, and sentiment has no place here. There are many damages of which this court can take no cognizance. *Damnum absque injuria.* The facts still remain, that this plaintiff occupied the menial position of general housework girl in the house of the intestate. The value of the services which she rendered under this alleged contract is the true measure of the damage in her case. We have proved, both by the plaintiff and her witnesses, that the market value of her services did not at any time exceed the sum of $1.50 per week. If she suffered any other damage in the disappointment of her hopes or the downfall of her expectations, we are sorry, but this court should take no notice of such remote and uncertain effects. We believe the decree should be for the defendant."

The Court took off his heavy spectacles, and laid them on his desk.

"But this," he said softly, "is a court of equity, a branch of the law which was expressly designed for the relief and protection of worthy parties whose remedies before the law were unjust or inadequate. We know of no case more fitting to come within our jurisdiction than the one now before us.

"There are some cases that cannot be compensated for by mere money damages. There are some services that are incapable of valuation in money. As to these the law permits individuals to make their own contracts. Old age is naturally repulsive. The hair grows gray, the eyes sunken, the skin wrinkled and drawn, the will feeble, the habits careless, needing all the care and attention of childhood, without its purity, loveliness, and affection as a compensation. The present claimant of the intestate's property, undoubtedly holding her relationship in abeyance, stood far off, waiting for his demise. The plaintiff, moved by his importunities and necessities, and recognized by him as his most faithful friend and servant, came to his assistance, and give him the affectionate care of a near relative, so that his last days were a redemption from those that immediately preceded them. And now, to deny her the compensation contracted for, in favor of one whose relationship is not asserted, either by word or action, until death seals his lips forever, would be unjust and inequitable, contrary to his desire, and in violation of his expressed covenant.[3]

"The decision is for the plaintiff. Prepare the findings and decree."

Denton was unusually late at the office the next morning. He had not realized until it was all over, how heavy the strain had been.

The Judge had already returned, and was busily engaged over the office routine. "Congratulations, son," he called, when he heard Denton enter his own office.

The junior member of the firm threw open the communicating door. "Hello, dad! You must have seen my grateful client, this morning," he ventured, much amused. The older man grinned. "Oh, I saw her all right. I tried to proffer her some advice on the safe investment of her new fortune, but she refused to intrust her affairs to my insecure keeping—said she guessed, if I didn't mind, she'd wait until Master Jack got down.

"Come in here, boy, and shake hands with your dad. I want to eat those last sage words of advice I gave you. It may be wise to know when you're beaten, but it is even more important to know—when you're not!"

Reynolds G. Barwick

[3] (Adapted from the opinion in Bryson v. McShane, 48 W. Va. 126, 35 S. E. 848, 49 L.R.A. 527). C. f. also Burdine v. Burdine, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

Editorial Comment

Commerce loves freedom.—Richardson.

Case and Comment
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Aeroplane Mail and Passenger Service.

THE great aeroplanes now hovering over the battlefields of Europe are forerunners of the aerial express of tomorrow. They have been perfected to such an extent that they are capable of sustained flights, and could transport passengers, mail, and merchandise with speed and certainty. Aircraft must henceforth be reckoned as part of our commercial and military equipment. Nations will contend with each other for supremacy in the construction of dreadnoughts of the air, as formerly they sought to surpass each other in the launching of dreadnoughts of the sea.

The greatest single factor in bringing about the closer union of the nations of North and South America will be the establishment of a government-owned aeroplane service for passengers and mail between the two continents, declared Albert Santos Dumont, the famous Brazilian aviator, in an address before the Pan-American Scientific Congress. He said that the time could be cut from twenty days by steamer to four days by airship. He even predicted that the future will witness the construction of an aeroplane capable of making the trip in one or two days.

"I do not think many years will pass before there will be established aeroplane service between the great cities of the United States and the capitals of South American countries," declares M. Santos Dumont.

"Men having big deals on hand will be able to close contracts in four days that under present conditions must wait during the transit of mail from twenty to forty days and more. The diplomatic relations between the governments of Washington and the South American countries will be more intimately established. New York will have the newspapers of South American capitals on the newsstands just as Chicago and Philadelphia papers are now on sale.

"There is another point to which I would draw your attention. All the European countries are old enemies. Here in the new world we should all be friends. We should be able, in case of trouble, to intimidate any European power contemplating war against any one of us, not by guns,—of which we have so few,—but by the strength of our union.

"One of the most powerful means of protection would be squadrons of aeroplanes, owned by the governments of the United States and South American countries to operate as allies in protecting their coast lines.

"Only a fleet of great aeroplanes could patrol our long coasts. I believe that in a few years the aeroplane will make from 300 to 400 kilometers (187 to 250 miles) an hour. This would bring the most distant places in South America within one or two days of New York."

Alexander Graham Bell, inventor of the telephone and one of the pioneer experimenters in aeronautics, has asked the Aero Club of America to urge Congress to establish postal air routes, in accordance with the plans recently outlined by the Postoffice Department, so as to bring into daily use thousands of aeroplanes which, while being used for peaceful purposes, shall form a reserve of trained aviators and partly supply the deficiency of the Army, Navy and Militia. In his recommendation Mr. Bell comments on the backwardness of the United States in aeronautics and says:

"Aviation originated in this country, but we have been left behind in the struggle for progress. The necessities of the European war have advanced aviation far more in Europe than here. It becomes our duty to prepare. The heavier-than-air flying machine has revolutionized warfare, and what should we do when war comes here?

"It is easy enough to make machines, but how about men? We must prepare men; we must make aviators, not by the handful but by the hundreds and thousands! The question is: How are we going to do this? How are we going to get these aviators trained before the occasion comes for their use in war? The answer is obvious. We must find use for them in peace. We must find occupations for numberless aviators, and it seems to me that one of the plans that has been proposed, and which has not been elaborated here, has in it the prospect of great success.

"It is to use the flying machine in the Postoffice, where the government can assist us. If we have hundreds of postal air routes with men carrying mails day after day, week after week, we will soon have a vast number of trained aviators accustomed to flying and intimately familiar with the appearance of the land over which they pass."

These suggestions have borne speedy fruit. Definite plans to establish regular aerial mail service in the United States are now being made by the government. In advertisements issued on February 12, for bids upon contracts, the Postmaster General gives manufacturers of aeroplanes and hydroplanes opportunity to meet practical tests as regular carriers of the United States mails. The bids are to be opened May 12, and October 1 next is named as the date for beginning service.

The advertisements cover one small route across Buzzard's bay and Nantucket sound, in southern Massachusetts, and seven routes in Alaska. If such service is proven feasible and reliable over these routes, a gradual expansion to many other routes upon which present means of transportation are slow and inadequate will follow.

But a few months ago such a proposal might have been thought impracticable, but in the light of recent developments it seems assured of success.

M. Dumont says that in the period of ten years the aeroplane has developed faster than did the automobile. "I, who am somewhat of a dreamer," he continued, "never anticipated what I beheld in the Curtiss factory. There I saw hundreds of skilled mechanics engaged in the building of aeroplanes, of which from twelve to eighteen are completed daily. To me the scene looked more like a dream than a reality.

"To-day the aeroplane can carry thirty passengers, can make 1,000 miles without coming to earth, has gone 26,260 feet in the air, and has flown 24 hours and 12 minutes without alighting, and between sunrise and sunset has traveled 1,300 miles. We no longer fear wind or weather. The modern machine can brave any gale, and fly through a storm of any velocity."

"The proposal of the Postoffice Department to contract for aeroplane mail service on the principal Alaska mail routes" comments the Seattle Post-Intelligencer, "furnishes a strong incentive to the commercialization of this new form of transportation, and it will doubtless be met by the organization of corporations possessing ample funds to make the experiment successful."

Discretionary Power of Land Department to Reject Entries.

THE decision of the United States Supreme Court in Daniels v. Wagner, 237 U. S. 547, 59 L. ed. 1102, 35 Sup. Ct. Rep. 740, settles a question of great practical importance in the administration of the land laws, involving the discretionary power of the Land Department to deprive claimants of the rights acquired by entries made in entire conformity with the acts of Congress and departmental regulations. It holds that the Land Department possesses no general discretionary power to reject entries on vacant public land selected, in entire conformity with the provisions of the act of June 4, 1897, and the departmental regulations, in lieu of lands relinquished in a forest reservation, or to award the lands to subsequent and subordinate applicants under the homestead, timber and stone, and other lands laws, nor can such discretionary power be said to arise because of the primary mistake made by the local land officers, who, disregarding their plain duty, rejected the lieu entries and allowed the filing of claims which were subsequent in date.

The decision is of special importance in view of the contrary position taken by the district court for the district of Oregon (194 Fed. 973), and the United States circuit court of appeals of the ninth circuit (125 C. C. A. 93, 205 Fed. 235), whose decisions are thereby reversed.

Professional Ethics.

THE Committee on Professional Ethics of the New York County Lawyers Association, has answered recently questions as follows:

QUESTION: Collection Agency Fees.—Partnership between Attorney and Layman.—Division of Fees with Layman disapproved.

A B, an attorney, is in partnership with C D, a layman, in the collection business, and, under the partnership agreement, divides the earnings of that business with C D. He does not divide with C D the fees which he may receive upon any act or service performed under his name and by virtue of his office as an attorney. A part of the partnership earnings, however, is derived from commissions charged upon collections made by attorneys to whom claims are sent by the partnership. Is there any impropriety in the above practice?

Answer. In the opinion of the Committee, it is improper for a lawyer to engage in partnership with a layman and divide fees. (See Q. & A. 47, I. a, I. b, II. a.)

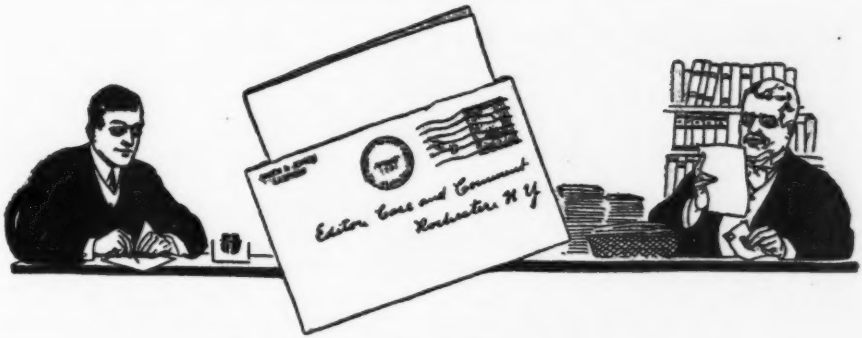
A fee charged for professional services is none the less a reward for professional services because it is called "a commission." Lawyers in other states, who are dividing with a collection agency here the compensation they receive for professional services, are themselves, in the opinion of the Committee, guilty of unprofessional conduct. That the service excludes the bringing of suit or appearance in court does not change the inherent character of the situation. In performing the service the lawyer's professional skill and responsibility are engaged. There is no objection to a lawyer engaging in the collection of an account (see Q. & A. 47, I. b), but when he does so, he does so as a lawyer, and is subject to the ethics of his profession.

QUESTION: Collections.—Relation to Court.—Relation to Client.—Furnishing client with blank summonses subscribed by attorney, to facilitate collections—disapproved.

Since the adoption of the new Municipal Court Code (N. Y. Laws 1915, chap. 279, § 19), which authorizes the issuance of summonses by attorneys at law, it is stated that some attorneys have permitted their clients to print blank summonses in large numbers, subscribed with the attorney's name, and to furnish their collectors with a pad of such printed summonses, so that the collector may fill the blanks and leave a copy of such summons with any customer who refuses payment.

In the opinion of the Committee, is such practice improper?

Answer. In the opinion of the Committee, the practice is unprofessional and illegal. An attorney should not delegate any professional function or power to his client. (See Matter of Rothschild, 140 App. Div. 583; 1st Dept. 1910.)



Readers' Comments

Political Status of Hawaii.

Editor CASE AND COMMENT:

The third paragraph on page 716 in the article: "Citizenship of the United States," by Charles S. Elgutter, reads as follows:

"A radical departure was made, however, in 1898, when Hawaii, Porto Rico, and the Philippines were annexed, with the proviso 'that the civil and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress.' In other words, the native inhabitants of these possessions are not citizens. Whether the natives of these islands at any time shall be admitted to the full privileges and immunities of citizens of the United States rests with Congress. It is Congress which shall determine to whom and to what extent rights of citizenship shall be extended to the native inhabitants of our insular possessions. At each session the tendency is to grant greater rights and privileges to the native people of these possessions, as they qualify themselves for a citizen's duties."

From this it would appear that Hawaii, Porto Rico and the Philippines possess at this time the same political status. I desire to call your attention to the fact that Hawaii enjoys a very different political status than Porto Rico and the Philippines. Hawaii has been made a territory of the United States, whereas Porto Rico and the Philippines are merely possessions. The act of April 30, 1900 "providing a government for the Territory of Hawaii," in § 4, declares that all persons who were citizens of the Republic of Hawaii on August 12, 1898, are citizens of the United States and citizens of the Territory of Hawaii. It has been held that this law bestows citizenship on whosoever owed allegiance to the Republic of Hawaii on the date mentioned, even though such persons were of the classes excluded from naturalization under our laws; *e. g.*, Mongolians, Malayans, and Indians. Accordingly, it is evident that the native inhabitants of Hawaii enjoy the full rights of American citizenship.

It is suggested that you give publicity to the information herein contained, so that your readers may not be misled as to Hawaii's status.

Yours truly,

WM. R. DONALDSON

Brooklyn, N. Y.

Capital and Labor.

Editor CASE AND COMMENT:

The terms "Capital" and "Labor" are often thrown together, as if the two were directly opposite in meaning. If we study the real meaning and significance of the words, however, we shall see that oftentimes, capital may be labor, and, vice versa, labor may be capital.

Take, for instance, the man who earns $1,200 per year. That individual is worth to the community $25,000 for $1,200 is the interest at 5 per cent, which $25,000 will earn in one year. Quære, Is not then, this earning capacity of such individual, capital, and good capital also? Is it not better for him, and better for the community, that the individual earn his $1,200, by some kind of labor, than that he take it, without effort on his part, as a sort of pension, income though it be called?

On the other hand, take capital, so-called. This capital was not produced, except by labor of some sort by some individual or set of individuals. The capitalist became so, either by inheritance or by his own labor. If by inheritance, his ancestor did the work and he reaps the benefit, and a poor benefit it is, generally speaking. He may have acquired a competence by his own efforts, which is more commendable, because his talents were put to use, and he became, for the time being, a producer, and therefore a benefactor. The community at large was benefited by his efforts, and he

himself grew, at least mentally, and in a practical way, His very experience is of some value, whereas the heir or remittance man is of little value to the community, because he lacks practicality, and he produces nothing.

Capital, then may be labor, and labor, capital, or they may be so dovetailed together, so indissolubly connected, that it may be difficult to determine where one begins and the other ends.

Then why the irrepressible conflict between labor and capital? Perhaps one answer to the question is that it is only when capital (the result of labor) becomes so concentrated in a few hands that it excites envy and alarm, appearing to be a menace to labor, because of the power unhappily associated with it.

Let us suppose all the wealth (capital) of the country to be in the hands of one man. Could not that individual control the price of labor, and the price of commodities. Would he not practically own everything, and consequently everybody, so that they would all become slaves to one master?

Prescott, in his History of Peru, says of the ancient Peruvians, that they had no money; but every person who was able, worked; the products were then distributed equally; therefore no one was rich and no one was poor; the aged and indigent were properly taken care of. A very nice adjustment of labor and capital!

In this enlightened (?) age, it would be impossible to so divide up the capital. The strong (capitally) would never consent, especially in America, where, said Edmund Burke, half of the population spends its time in getting dollars, and the other half in breeding dollar getters.

There is no law against accumulation, except taxation, which can never amount to confiscation; the rule against creating perpetual estates; and the anti-trust laws,—which latter are of doubtful efficacy.

So the conflict will go on (this being a free country) until in some unforeseen way the scales may be adjusted and a balance struck which will satisfy the demands of labor and gratify the ever-growing greed of capital.

Capital may say to labor, "Why do you complain? wages were never so high as now." Labor replies, "Yes, but capital gets it all back, because commodities in the hands of capital, and which we must have in order to exist, were never higher than they are at present."

Shades of John Stuart Mill, Henry George et al.! where are you with your nice theories of political economy! When the ordinary laboring man, with a family to support, can procure labor only half the time, and receive wages that will not pay the bills exacted by capital?

Then, too, capital spreads himself like a green bay-tree, and, seated proudly and comfortably in his limousine, sails by labor trudging ignominiously through the streets. This tends to make labor still more discontented, and we have strikes, boycotts, and lock-outs.

The only solution of this mighty problem is to curb concentration of capital. How this can be done, so as not to interfere with the constitutional right to life, liberty and the pursuit of happiness, is one of the most vital problems of the present age.

May we all put on our thinking-caps, and soberly and without malice, and at the same time without fear, try to effect in the wisest and most equitable manner, an adjustment of labor and capital, that will satisfy the needs of the one, and curb the fast-growing power of the other.

WALTER S. WHITON.

Minneapolis, Minn.

Public Defender Legislation.

Editor CASE AND COMMENT:

Anent the agitation to establish the office of public defender to represent indigent accused persons, it may be of interest to your readers to know that the success of the public defender's office in Los Angeles county, California, has resulted in the recent appointment of a public defender for the police courts in Los Angeles.

The office of public defender was also created by the city council of Columbus, Ohio, for the municipal court of that city. There are public defenders now in the cities of Omaha, Pittsburgh, Houston, Temple (Tex.), Portland (Ore.), and Evansville, Ind. Other cities are actively agitating the public defender idea. A public defender bill was recently passed by both houses of the Georgia legislature, but apparently has not become a law as yet. A similar bill was recently introduced in the New Jersey legislature, and bills are likely to be introduced in various other state legislatures in the near future.

The writer expects to have the public defender bills which he prepared and had introduced at the 1915 session of the New York legislature shortly reintroduced.

It is apparent that the soundness of he public defender idea is beginning to be recognized throughout the country, and that New York must inevitably declare itself in favor of elevating its administration of the criminal law, so that no injustice may be done to any accused person by reason of his inability to properly defend himself.

MAYER C. GOLDMAN.

New York City, N. Y.

Among the New Decisions

Where law ends tyranny begins.—William Pitt.

Admiralty — jurisdiction — death of seaman. That no action lies in admiralty against the shipowner for the death of a seaman, in the absence of statute conferring it, is held in Rainey v. W. R. Grace & Co. 132 C. C. A. 509, 216 Fed. 449, which is accompanied in L.R.A. 1916A, 1149, by a note on jurisdiction of, and law governing, action for death on water.

Apportionment — value — property used by several departments — use basis. The value of property used in common by the electric, water, and street railway departments of a utility was apportioned on the basis of use, by the Missouri Commission in Re Fort Scott & N. Light, Heat, Water & P. Co. 2 Mo. P. S. C. R. 581, P. U. R. 1915F, 512, as by apportioning respectively the boiler plant and electric equipment on the basis of the estimated average amount of steam and electricity used by each department.

Automobile — collision with obstruction — excessive speed — right to recover. That the view of the driver of an automobile is obscured by lights on a car approaching from the opposite direction, and that his own lights do not illuminate the roadbed because of a bend in the highway, is held in Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A, 1111, not to alter the rule that it is negligence for him to drive so fast that he cannot stop within the distance that an obstruction can be seen, and therefore he cannot recover for injury by collision with an obstruction left in the road at the turn, which he cannot avoid after discovering it because of his speed.

Automobile — cutting corner — negligence. It is held to be negligence in Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, to turn a corner to the left with an automobile at high speed, by passing close to the left-hand curb, where the view is obstructed by a building near the sidewalk.

The cases on liability for collision between automobiles or an automobile and another vehicle at or near corner of streets or highways are gathered in a note appended to the foregoing decision in L.R.A.1916A, 744.

Bank — national — subscription for stock in corporation to erect building. A national bank is held in Fourth Nat. Bank v. Stahlman, 132 Tenn. 367, 178 S. W. 942, to have power, in order to secure a desirable banking home, to subscribe for stock in a corporation organized to construct a building, quarters in which are to be rented to the bank for a term of years, upon the promoter's agreement to repurchase the stock within a specified time.

The cases on the power of a national bank to acquire and hold stock of other corporations are gathered in the note appended to the foregoing decision in L.R.A.1916A, 568.

Bankruptcy — accepting check for note — set-off. A bank which, with knowledge of its customer's insolvency, accepts his check in payment of an overdue note held by it, is held in Knoll v. Commercial Trust Co. 249 Pa. 197, 94 Atl. 750, annotated in L.R.A.1916A, 683, to forfeit its right to set off the note against the deposit, and in case the check is given within four months of the filing of a petition in bankruptcy against the customer, the amount of the check must be returned to the bankruptcy trustee as an unlawful preference.

Carriers — caretaker on certificate — injuries — liability. One traveling, in accordance with the shipping contract, on a certificate as caretaker for potatoes which require protection from cold, is not traveling gratuitously, although no extra charge is made for his transportation, and the carrier offers alternative transportation in cars owned and heated by a stranger who is to be compensated by the shipper for his services, and therefore it is held in Buckley v. Bangor & A. R. Co. 113 Me. 164, 93 Atl. 65, that the carrier cannot contract for exemption from liability for negligently injuring him.

The right of a carrier to limit its liability to drovers or caretakers accompanying a shipment is discussed in the note appended to the foregoing case in L.R.A.1916A, 617.

Carrier — safe premises — one transacting business with produce buyer on its platform. A railroad company which maintains a platform for the shipment of cotton, upon which by custom buyers and shippers congregate and cotton is weighed, is held bound in the Alabama case of Southern R. Co. v. Bates, 69 So. 131, annotated in L.R.A.1916A, 510, to use ordinary care to maintain the platform in a safe condition for the use of one who, at the request of a buyer transacting business on the platform, comes to it to see him with respect to a sale of real estate, since the facilitating of cotton shipments over its road gives it an interest in obviating the necessity of the buyer going elsewhere to transact the business.

Carrier — special contract with stock yards — discrimination. A railroad company it is held in Smith v. Louisville & N. R. Co. 131 Tenn. 531, 175 S. W. 557, L.R.A.1916A, 1107, is not prevented from contracting to make a particular stock yard within a city the place of delivery for all live stock shipped into the city, so as to require payment of a switching charge for delivery of carloads of stock to other yards, by a statute making it unlawful to give an undue advantage to any particular person or description of traffic, or subject any person or particular description of traffic to undue or unreasonable prejudice or disadvantage.

Check — effect of death of drawer. To the extent that a bank check works as assignment *pro tanto* of a fund on deposit, the death of the depositor, it is held in the New Mexico case of Elgin v. Gross-Kelly & Co. 150 Pac. 922, annotated in L.R.A. 1916A, 711, will not revoke the authority of the bank to pay the check, which has been given for a valuable consideration, and is therefore coupled with an interest.

Conflict of laws — note by married woman. A note executed by a married woman in a state where she has no power to contract, and there placed in the mail for delivery, according to the instructions of the beneficiary, cannot be enforced it is held in Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, Ann. Cas. 1915D, 1132, although she was a resident of, and the note was payable in, another state, where such notes are valid and enforcement is sought.

The conflict of laws as to the capacity of a married woman to contract is discussed in the note appended to the foregoing decision in L.R.A.1916A, 1049.

Conflict of laws — rights of inheritance — law of forum. A state in which an adopted child inherits from collateral

kindred of its adopting parents will, it is held in Anderson v. French, 77 N. H. 509, 93 Atl. 1042, annotated in L.R.A. 1916A, 660, apply its own laws in determining the right of such child to property within its limits of which one of its citizens died seized, rather than the law of the state of adoption, by which such child does not inherit from collateral kindred.

Constitutional law — closing commercial houses — police power. That the police power does not extend to compelling mercantile and commercial houses in a city to close at 6 o'clock in the evening is held in the Utah case of Saville v. Corless, 151 Pac. 51, which further determines that an act requiring mercantile houses to close at 6 o'clock in the evening is void as special legislation if it applies only to cities containing more than a certain number of inhabitants, and exempts from its provision drug stores and persons dealing in foodstuffs.

It is further held that forbidding merchants to keep their stores open after 6 o'clock in the evening unconstitutionally deprives them of their property rights.

The validity of a statute or ordinance requiring commercial or mercantile establishments to close at certain hours is discussed in the note appended to the foregoing case in L.R.A.1916A, 651.

Constitutional law — forbidding sale of unfit animal. That no constitutional property rights are infringed by forbidding the sale or exchange, under penalty, of any animal unfit for labor is held in State v. Prince, 77 N. H. 581, 94 Atl. 966, which is accompanied in L.R.A. 1916A, 950, by a note on the constitutionality of statutes or ordinances for the prevention of cruelty to animals.

Corporation — foreign — noncompliance with laws — action against agent. An agent of a foreign corporation doing business within the state without complying with the laws so as to be entitled to do so, is held not entitled in Memphis & A. City Packet Co. v. Agnew, 132 Tenn. 265, 177 S. W. 949, annotated in L.R.A.1916A, 640, to defeat an action to compel him to account for secret profits made by the use of the corporate funds and facilities, on the theory that it is not entitled to maintain an action in the state courts.

Courts—compelling transfer of stock by foreign corporation. That a court of equity in one state, where a foreign corporation has an office for the transaction of business, and where its transfer agents reside, may compel a transfer of stock upon its books at the suit of one also a resident of the state, is held in Travis v. Knox Terpezone Co. 215 N. Y. 259, 109 N. E. 250, L.R.A.1916A, 542.

Criminal law — right to particular juror. The defendant in a criminal action, it is held in Blankenship v. State, 10 Okla. Crim. Rep. 551, 139 Pac. 840, acquires no vested right to have a particular member of the jury panel sit upon the trial of his case until he has been accepted and sworn, and unless it be shown that an objectionable juror was forced upon the defendant after he had exhausted his peremptory challenges, he is not entitled to complain of the refusal of the court for a full jury panel of twelve jurors from which to select a jury of six to try the case.

The right of the accused in a criminal case to a full panel from which to select a jury is discussed in the note accompanying the foregoing decision in L.R.A. 1916A, 812.

Damages — delay in forwarding trunks. The measure of damages for a carrier's delay in forwarding the sample trunks of a traveling salesman is held in the Oklahoma case of Kansas City, M. & O. R. Co. v. Fugatt, 150 Pac. 669, annotated in L.R.A.1916A, 545, to be the value of the use of the property during the delay, together with the loss of time occasioned thereby; the carrier's agent receiving the trunks for transportation with knowledge of their contents and intended use.

Loss of time and inability to make sales because of delay in receiving trunks containing samples will be regarded the court state as within the contemplation

of the carrier when it receives and checks a salesman's sample trunks as baggage, so as to entitle him to recover damages therefor in case of such delay.

Damages — for unlawful exaction for transportation of corpse. Actual and punitive damages it is held in the South Carolina case of Osteen v. Southern R. Co. 86 S. E. 30, L.R.A.1916A, 565, may be allowed to a relative in charge of the transportation of a corpse by rail for the act of the conductor in compelling payment of fare with an unlawful excess after a corpse ticket had been procured and surrendered to the baggage master and a check for the casket issued, so that the corpse was under the jurisdiction of the one in charge of the baggage car, and not within that of the conductor.

Deed — reservation of water power — effect. An attempted reservation by one granting land bordering on a river, of a share in the water power and the necessary ground to utilize the same, is held void in the Texas case of Richter v. Granite Mfg. Co. 174 S. W. 284, accompanied with annotation in L.R.A. 1916A, 504, since the reservation of the ground is uncertain, and the right to the water power cannot be severed from the riparian land.

Discrimination — rates — telegraphs — payment of commission to agent. That the payment by a telegraph company of commissions to hotels and storekeepers on messages collected by them from patrons and delivered to the company for transmission is not illegal as a rebate or departure from the published tariff, where the hotels, storekeepers, and their patrons pay a full tariff rate on all messages, is held in the California case of Postal Teleg. Cable Co. v. Western U. Teleg. Co. P.U.R.1915F, 863, on the ground that the Commission is payment for service as agent.

Discrimination — rates — telephones — hotels — lobby service — pay stations. That the practice of a hotel of purchasing telephone service at wholesale rates and retailing it to the public at from two and one-half to five times the price paid the utility, by means of switch boards and other equipment installed by the utility in the hotel lobby and controlled and operated by the hotel in connection with the utility's outside equipment, is an unlawful discrimination against other pay stations which are not allowed such a great proportion of the receipts and whose entire equipment is under the sole control of the utility, is held by the Illinois Commission in Hotel Sherman Co. v. Chicago Teleph. Co. P.U.R.1915F, 776.

Discrimination — service — reservation of accommodations. That the practice of a railroad company of reserving accommodations without additional compensation is not unduly discriminatory where the company furnishes sufficient accommodations of the same kind for those who have not made reservations is held in the Philippine case of Dean v. Manila R. Co. P.U.R.1915F, 106.

Election of remedies — action on conditional sale contract — effect on title. That a conditional vendor waives his right to recover possession of the property by taking judgment against the purchaser for the contract price of a portion of the property is held in the Oregon case of Francis v. Bohart, 147 Pac. 755, annotated in L.R.A.1916A, 922.

Evidence — happening of accident — shifting of burden of proof. In an action by a passenger against a street car company to recover for injuries caused by the bursting of an electric light bulb, the burden of proof in the sense of persuasion upon the whole case does not, it is held in Hughes v. Atlantic City & S. R. Co. 85 N. J. L. 212, 89 Atl. 769, shift to defendant when the happening of the accident is shown.

Supplemental annotation on the relation of the doctrine of *res ipsa loquitur* to the burden of proof accompanies the foregoing case in L.R.A.1916A, 927.

Evidence — of witness since deceased — identity of issues. Testimony of the motorman in an action by a father as next of kin for a minor child to recover for injuries caused by collision with a street car is held admissible in the Rhode

Island case of Lyon v. Rhode Island Co. 94 Atl. 893, annotated in L.R.A.1916A, 983, in an action by the father, tried after the death of the witness, to recover for injuries to himself growing out of the same accident, where counsel representing the father in his action also represented him in the former action, and fully cross-examined the witness at that time.

Evidence — parol to vary writing — effect against stranger. The rule that parol evidence is not admissible to vary a written instrument is held not to apply in Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041, annotated in L.R.A. 1916A, 588, to prevent showing that a bill of sale to an agent was intended merely to enable him to transfer title to a purchaser, and not to invest him with ownership, as against the claim of a creditor of the agent who has levied execution upon the property.

Evidence — waiver of privilege — effect on subsequent trial. Failure at one trial to object to the introduction of testimony on the ground of privilege is held in the Arkansas case of Maryland Casualty Co. v. Maloney, 178 S. W. 387, annotated in L.R.A.1916A, 519, not to waive the right to make such objection on a subsequent trial of the same case, where the adversary has not been misled by the failure.

Fixtures — wharf — base fee. That a wharf affixed to the soil for the better enjoyment thereof becomes part of the real estate, although the owner has only a base, qualified, or determinable fee therein, is held in the North Carolina case of Prichard v. Pasquotank & N. River S. B. Co. 86 S. E. 171, annotated in L.R.A.1916A, 961.

Gas — puncturing of pipe — explosion — liability. Knowledge by public officials of the existence of a gas pipe beneath the surface of a highway when directing an employee to run a steam roller over it is held in the Kentucky case of McWilliams v. Kentucky Heating Co. 179 S. W. 24, L.R.A.1916A, 1224, not to release the gas company from liability for injury resulting from an explosion of gas due to the puncturing of the pipe by the engine because the pipe was laid too close to the surface.

Guardian and ward — sale of real estate — denial of receipt of price. That a guardian who secures an order permitting sale of his ward's real estate upon representation, under oath, that he has been offered a certain amount for it, and who returns under oath that he has received that amount, and secures confirmation of the sale, executing a deed certifying to the receipt of the sum named, cannot refuse to account to the ward for that amount upon the ground that he in fact received a much less amount, which was evidenced by uncollectable promissory notes, is held in Re Potter, 249 Pa. 158, 94 Atl. 465, annotated in L.R.A.1916A, 637.

Highway — injury by contractor — liability. Where a county is not liable for defects in its highways, one contracting to construct and repair highways for it is held not liable in Ockerman v. Woodward, 165 Ky. 752, 178 S. W. 1100, annotated in L.R.A.1916A, 1005, for injury to a traveler by a pile of stones placed by him in the highway and left unlighted at night.

Highway — unsafe sidewalk — missing brick. That a city is not liable for injury to a pedestrian by a fall due to a missing brick and consequent depression to the extent of its thickness in one of its sidewalks, is held in the Mississippi case of Meridian v. Crook, 69 So. 182, annotated in L.R.A.1916A, 482.

Homestead — remarriage of widow — effect. The remarriage of a widow is held in Davis v. Neal, 100 Ark. 399, 140 S. W. 278, annotated in L.R.A. 1916A, 999, not to deprive her of the benefit of a statute exempting a homestead during the time it is occupied by a widow of any deceased person entitled to the benefit of the homestead laws.

Homestead — right to second homestead. A widow's right to homestead in the estate of her husband is held not af-

fected by the circumstance that she has had homestead assigned to her out of the lands of a former husband, in Smith v. Rittenhouse, 260 Ill. 599, 103 N. E. 569, annotated in L.R.A.1916A, 997.

Injunction — against distribution of convict's photograph. One pardoned after conviction of crime it is held in Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122, annotated in L.R.A.1916A, 739, cannot enjoin the distribution of photographs and other data for identification, which became part of his record as a convict, among the police officials and penal institutions of the state.

Insurance — accident — ptomaine poisoning. Death by ptomaine poisoning due to partaking of tainted food through mistake is held within the terms of a policy insuring against death by accident, in Johnson v. Fidelity & C. Co. 184 Mich. 406, 151 N. W. 593, annotated in L.R.A.1916A, 475.

Insurance — effect of assignment. A parol assignment of an insurance policy, accompanied by its delivery to the assignee, and followed by his subsequent contribution towards payment of premiums, is held not sufficient in Johnson v. New York L. Ins. Co. 56 Colo. 178, 138 Pac. 414, to defeat the rights of the designated beneficiary if the policy provides that the beneficiary can be changed by written notice provided the policy is not assigned, and that assignment must be made in duplicate, one copy of which is to be retained by the insurer.

The right of one to whom a policy of life or benefit insurance was assigned by the insured to proceeds, where provisions as to change of beneficiary were not complied with, is discussed in the note accompanying the foregoing decision in L.R.A.1916A, 868.

Insurance — mortgagee's interest — right of subrogation. That one issuing a policy of insurance to the owner of the equity of redemption in mortgaged property, containing a clause making the loss payable to the mortgagee, as his interest may appear, is not entitled to subrogation to the rights of the mortgagee against him, upon paying the mortgagee the amount of his interest, after the insured has lost his right of recovery by transferring his interest in the property, contrary to the terms of the policy is held in the Oregon case of Milwaukee Mechanics' Ins. Co. v. Ramsey, 149 Pac. 542, annotated in L.R.A.1916A, 556.

Insurance — payment of premium — check. The annual premium stipulated for in a life insurance policy to be paid by the assured is not a "debt" and the strict rule governing the payment of debts by check or draft is held not to control the payment of such premium, in the Oklahoma case of Mutual Ben. L. Ins. Co. v. Chattanooga Sav. Bank, 150 Pac. 190, which is accompanied in L.R.A. 1916A, 669, by a note on check or draft as payment of insurance premium.

Judgment — libel — subsequent publication — res judicata. A judgment in plaintiff's favor for the publication of a libel in the evening edition of a newspaper is held no bar to another suit for publication of the same libel by the same publishers in an edition published the following morning under another name, in Cook v. Conners, 215 N. Y. 175, 109 N. E. 78, which is accompanied in L.R.A. 1916A, 1074, by a note on publication in different editions or publications as distinct causes of action.

Larceny — misplaced property. One is held guilty of larceny in State v. Countsol, 89 Conn. 564, 94 Atl. 973, annotated in L.R.A.1916A, 465, where he takes up property with the intent to appropriate it to his own use, which has been left by a passenger on the seat of a street car, with knowledge of where he left it and the restoration of which is speedily applied for.

Life tenant — injury by stranger — recovery for remainderman. A life tenant it is held in Rogers v. Atlantic, G. & P. Co. 213 N. Y. 246, 107 N. E. 661, may recover the damages to both life estate and remainder from one negligently setting fire to the property, not on the theory that he is liable over to the re-

mainderman for the waste, but as trustee in possession for the remainderman.

The note appended to the foregoing decision in L.R.A.1916A, 787, discusses rights of action in case of damages to remainder or reversion by stranger.

Limitation of actions — toll — payment — proceeds of collateral. A credit on a note, to toll the statute, must be a voluntary payment. And the application, by the holder of the note, of the proceeds of the sale of securities hypothecated at the time of the making of the note, as a credit on the note, is held in the Oklahoma case of Berry v. Oklahoma State Bank, 151 Pac. 210, annotated in L.R.A. 1916A, 731, not to toll the statute; for the reason that it does not constitute a new promise to pay, or a new acknowledgment of the indebtedness. But is only an enforcement of the original obligation and promise.

Lost property — money on desk in safe deposit vault — custody. That money on a desk in a private compartment of a safe deposit company is not lost, although the person who left it there is not known, so as to entitle a customer who discovers it, to its custody as against the deposit company, is held in Foster v. Fidelity Safe Deposit Co. 264 Mo. 89, 174 S. W. 376, annotated in L.R.A. 1916A, 655.

Master and servant — injury by automobile — liability of owner. The owner of an automobile is held not liable in Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, annotated in L.R.A. 1916A, 954, for injury caused by negligent driving of his chauffeur, who is employed by the month, and lives on the owner's premises, while using the car with the master's acquiescence to do marketing for himself.

Mechanics' lien — directors of debtor — postponement — judgment creditors. Judgment creditors of a railway company are held not entitled in the Missouri case of Baumhoff v. Grueninger, Jr. 178 S. W. 102, L.R.A.1916A, 779, without paying the cost of the construction, to postpone a mechanics' lien judgment to their claims because the lien is in favor of a construction company, members of which are directors of the railway, contrary to the provisions of a statute forbidding such directors to be directly or indirectly interested in contracts to furnish materials or supplies to the railway.

Municipal corporation — authority to engage in business. Constitutional authority to a municipal corporation to own and operate an electric light and power plant is held in the Michigan case of Andrews v. South Haven, 153 N. W. 827, L.R.A.1916A, 908, to include authority to sell and install electrical apparatus and supplies for compensation.

Negligence — injury to consumer — liability of manufacturer. A manufacturer of chewing tobacco is held not liable in Liggett & M. Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009, L.R.A.1916A, 940, for injury to a consumer who purchases through an intermediary because of the incorporation into the product of a poisonous insect, if he had no knowledge or reasonable means of knowledge from anything brought to his attention of its existence.

Payment — extensions — guaranty for — how ascertained. The amount of the annual payment for service which a new consumer of an electric utility was required to guarantee as a condition for extending service was determined by the Wisconsin Commission in City School Board v. Beloit Water, Gas & Electric Co. P.U.R.1915F, 31, by assuming the total investment necessary for the extension to bear the same ratio to its estimated cost as the investment in the entire plant bore to the investment in the distribution system, and then assuming that a 5 per cent return upon such total extension investment bore the same ratio to the annual payment required as the amount of gross revenue over operating expenses bore to the total revenue.

Process — service on suitor passing through state. That a suitor is not subject to service of process in an intermediate state through which he is passing, in

a suit instituted there, while *en route* from a trial which he was attending as suitor and witness in one state to his home in another state, is held in Sofge v. Lowe, 131 Tenn. 626, 176 S. W. 106, annotated in L.R.A.1916A, 734.

Railroad — duty to look before crossing. The driver of an automobile who, after stopping to listen and look for smoke 35 feet from a railroad crossing, at a point where he had no view of the track, permits the machine to run by gravity toward the track past the point 17 feet from it, where his view of it became clear, and onto the track immediately in front of an approaching train, is held negligent in the California case of Griffin v. San Pedro, L. A. & S. L. R. Co. 151 Pac. 282, L.R.A.1916A, 842.

Rates — factors to be considered — heating. A utility was permitted to establish a schedule of rates for heating water by means of steam coils, which was based upon the probable additional expense to the company caused by the installation rather than upon the amount of radiating surface of the coils or of the tank as applied to the average amount of water used by each consumer, in the Illinois case of Taylorville v. Central Illinois Public Service Co. P.U.R.1915F, 336.

Rates — street railways — jurisdiction of commission. That the Colorado Public Utilities Commission has sole jurisdiction to regulate the rates and service of a street railway located in a city, to the exclusion of the local authorities, is held in Castle Rock Mountain R. & Park v. Denver Tramway Co. P.U.R.1915F, 224, although the city is governed under a special charter under the "home rule" amendment to the Constitution giving it power to control and to legislate in regard to its local, municipal, and internal affairs, since such regulation arises through the police power of the state, is a matter of state-wide importance, and is in no sense a local, municipal, or internal matter.

Record — defect — notice of facts which inquiry would disclose. The record of a mortgage of land which fails to mention the range in which it is located is held not notice to a subsequent purchaser in the Arkansas case of Neas v. Whitener-London Realty Co. 178 S. W. 390, accompanied in L.R.A.1916A, 525, by a note on mistake in description of property as affecting record of instrument relating to real property, although it was a purchase money mortgage and the deed to the mortgagor is also on record and examination of it would make the description complete.

Return — excessive salary paid controlling stockholder as part of return. That the amount of salary paid by a utility to a controlling stockholder in excess of reasonable and just compensation for the services rendered must be regarded as a part of the return on the investment, is held in the Idaho case of Sandpoint v. Sandpoint Water & Light Co. P.U.R. 1915F, 445.

Sale — condition — renewal of note — effect. Where a new note containing a contract of conditional sale, reserving title to the same property in the vendor until payment of the purchase money, was taken to secure the same debt, and it was recited in the renewal note that it was given only for the purpose of extending the old conditional sale note, this did not it is held in Carlton Supply Co. v. Battle, 142 Ga. 605, 83 S. E. 225, annotated in L.R.A.1916A, 926, operate to extinguish the old note so as to postpone it to an intervening mortgage given by the vendee, although the old contract of conditional sale may have been marked paid, surrendered to the vendee, and canceled of record.

Sale — refusal to accept — effect on title. The refusal of the buyer to accept articles manufactured for it according to contract, and delivered to it, in which the seller does not concur, it is held in Murphy v. John Hofman Co. 215 N. Y. 185, 109 N. E. 101, L.R.A.1916A, 634, will not prevent the passage of title so as to prevent their passing to the buyer's bankruptcy assignee.

Service — railroads — continuance of operation — public aid — effect of foreclosure sale of road. That the rights

of residents along the line of a railroad to compel a continuance of the operation of the road, who had extended aid through grants of taxes and donations of cash, labor, and materials, and had made valuable improvements in property and the like in reliance upon the continued operation of the road, are not lost by a sale of the road under foreclosure proceedings, and that the right inheres against the purchaser and his successor is held in the Iowa case of Smith v. Atlantic Southern R. Co. P.U.R.1915F, 125.

Service — water — cost of service connection. That the consumer must pay the cost of renewing a connection originally too small to furnish an adequate supply of water which was put in in conformity to his order at his expense, and accepted and used by him, under the custom that formerly obtained, requiring the consumer to pay for the connection, was held in the West Virginia case of South Buckhannon v. Buckhannon Light & Water Co. P.U.R.1915F, 383, upon the ground that it was his duty to see that such connection was adequate and proper. The Commission said that it will order the cost of enlarging or replacing a connection to furnish an adequate supply of water to be paid by the party at fault where it is clearly shown that the inadequacy was due to the fault of one of the parties.

Tax — collateral inheritance — foreign heirs — treaty. That a state is not, by a treaty providing for the free disposition and inheritance of the goods and effects of the citizens of the contracting parties, and providing that the inheritance shall be exempted from all duty called *droit de detraction* on the part of the government of the contracting parties respectively, prevented from imposing a collateral inheritance tax upon estates passing from its citizens to nonresident citizens of the foreign contracting party, at a higher rate than is imposed upon such inheritance going to its own citizens, is held in the Iowa case of Re Peterson, 151 N. W. 66, annotated in L.R.A.1916A, 469.

Tax — inheritance — personalty in other state. A state, it is held in the California case of Re Hodges, 150 Pac. 344, L.R.A.1916A, 837, may impose an inheritance tax upon personal property of one who died domiciled within its limits, although the property is located in another state, where it will be distributed under ancillary proceedings according to the law of the state of domicil, and never come within the jurisdiction of the latter state.

Trover — delivery of pledged bonds to strangers. One who has in good faith taken from a pledgeor, as collateral security for his debt, bonds merely intrusted to him for safekeeping, is held in Varney v. Curtis, 213 Mass. 309, 100 N. E. 650, Ann. Cas. 1914A, 340, L.R.A. 1916A, 629, to convert them by delivering them under direction of the pledgeor to a stranger, to be held as collateral for a loan which he is to make to the pledgeor for the payment of the debt for which the collateral was originally taken.

Water — eaves drip — right to cast onto adjoining property. That a property owner has no right to permit the water from his roof to fall over the boundary line to the injury of adjoining property, is held in Shea v. Gavitt, 89 Conn. 359, 94 Atl. 360, which is accompanied in L.R.A.1916A, 689, by a note on the subject.

Recent English Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Bailments — liability of furniture mover for destruction of goods. That a furniture mover does not, by undertaking to move household goods, incur the liability of a common carrier, and therefore is not liable for the destruction

of goods during removal without any negligence on his part, is held in Watkins v. Cottell, 85 L. J. K. B. N. S. 287.

Contracts — arbitration clause — powers of arbitrator. The House of Lords has held—overruling Hutcheson v. Eaton (1884) L. R. 13 Q. B. Div. 861, 51 L. T. N. S. 846, and Re North Western Rubber Co. [1908] 2 K. B. 907, 78 L. J. K. B. N. S. 51, 99 L. T. N. S. 680—that where a contract for the sale of goods provides that all disputes arising out of the contract shall be referred to arbitration, the arbitrators have jurisdiction to decide as to the existence of a custom of the trade the existence or nonexistence of which is relevant to the true meaning and effect of the contract. Produce Brokers Co. v. Olympia Oil & Cake Co. 85 L. J. K. B. N. S. 160.

Street railway — contributory negligence — defective brake as decisive cause of injury. Where acts of negligence on the part of different individuals contribute to an injury, it is often a difficult matter to determine upon which of them the responsibility for the happening should fall. "It is surprising," said Lord Sumner in British Columbia Electric R. Co. v. Loach, 85 L. J. P. C. N. S. 23, affirming 19 B. C. 177, "how many epithets eminent judges have applied to the cause which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents which for this purpose are not the cause at all. 'Efficient or effective cause,' 'real cause,' 'proximate cause,' 'direct cause,' 'decisive cause,' 'immediate cause,' *'causa causans'* on the one hand, as against, on the other, *'causa sine qua non,'* 'occasional cause,' 'remote cause,' 'contributory cause,' 'inducing cause,' 'condition,' and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification." In this case, it was held that an original act of negligence may be regarded as the efficient or decisive cause of an injury although anterior in point of time to the plaintiff's contributory negligence; and accordingly that a crossing accident may be held to have been caused by the negligence of the railway company in sending out a car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed which required a perfectly efficient brake to arrest it, notwithstanding the plaintiff was guilty of contributory negligence in attempting to cross the track without taking reasonable precautions to ascertain whether a car was approaching.

Industrial Courts

As long ago as 1806 France created industrial courts and the example has been followed by Germany, Switzerland, Italy and Belgium. A president, who represents the public, and an equal number of workers and employers sit as a jury rather than as a court. Lawyers are barred; the parties to the dispute take turns relating grievance and defense, and in consequence of this simplicity 90 per cent of the cases are adjusted without formal hearings. In event of threatened strikes or lockouts, the courts have the power to sit as boards of arbitration, and it is only in rare cases that satisfactory agreements are not reached.—Century.

QUAINT and CURIOUS

Wise saws and modern instances.—Shakespeare.

Not Much Alike. A well-known inventor and mechanical expert distinguished himself by a particularly skilful answer to what was intended to be a particularly hard question on the part of a lawyer who was cross-examining him.

A party to a suit had taken out a patent on a new sort of truck car, a car mounted on two trucks. The validity of the patent was attacked, and the inventor mentioned was called as an expert in the interest of the patentee.

Counsel for the other side showed that it had been usual to transport long pieces of merchandise, as well as tree-trunks and lumber, on two small four-wheeled cars, to which the ends of the long thing were lashed, and he tried to make the expert acknowledge that a passenger car on two trucks was really the same thing as a big log lashed upon two small four-wheeled cars.

The expert could not be brought to the admission, and after a multitude of sharp questions the lawyer said:

"Will you please tell the court wherein consists the difference between a log lashed to two four-wheeled cars, and a passenger car riding on two trucks?"

The expert thought for a moment, and then answered:

"Sir, a log lashed to two trucks is no more a passenger car riding on two trucks than two men carrying a log between them on their shoulders are a quadruped."

Handicapped. There was a trial on in a justice court in Texas. A witness for the plaintiff was on the stand, and was giving damaging evidence against the defendant, who was represented by two old practitioners, one nearly deaf and the other nearly blind.

The nearly deaf one said to his associate: "What did the witness say?" The nearly blind one replied: "What witness?"

Hoyle on Coon-can, Revised. John Weakley, negro, was convicted this week at Hiawatha of having killed William Pollard, negro, at Holton, Thanksgiving Day over a game of coon-can. "Coon-can," County Attorney W. E. Archer told the jury, "is a two-handed game of great possibilities. The dealer deals a specified number of cards face down, as nearly as I can make it. He turns the last card, exclaiming as he does so, 'I win.' His opponent replies, 'You're a liar,' and reaches for his razor. The dealer reaches for his social and defensive weapon, and the contest then becomes one entirely of skill. The survivor wins the game, and Brown county pays the bills."—Kansas City Star.

To the Last Card. A young attorney who has quite a reputation for his impassioned flights of oratory was making an address to the jury in a criminal case recently, and at the height of his oratory he said: "Gentlemen of the jury, if you feel as I do about this case, you will stay in that jury room until Gabriel plays his last trump before you will return a verdict of guilty against this defendant."

The Teckum Family. About four years ago, a certain lawyer in Arkansas,

who has seen service in the lower national house, related a story which is good enough to hand down to posterity, if too far ahead of the present generation. We will hand it in to CASE AND COMMENT, writes Mr. S. M. Wassell of the Little Rock Bar, for safe keeping until such time as there is space in that journal wherein it may be recorded for all time.

Our friend, the narrator to me, is a very forceful jury lawyer. There was a suit involving "the rights of property," as a replevin suit in some localities is referred to. His opponent, also a very forceful jury lawyer, left the impression on the clerk of the court that he was not going to be ready to try the case. The day rolled around, as days oft times do, for the issuance of subpœnas for witnesses. The defendant's attorney called on the clerk for a subpœna for 'Squire M'Intosh (judge of the lower court). The subpœna was handed counsel for defendant, who inserted after the words "'Squire M'Intosh," "& Dices Teckum." His spelling was a little bad, but he had the right idea, as he wished to establish the fact that the appeal was taken within the time, and, as the transcript was faulty and showed on its face that he had not perfected the appeal within the statutory time, he wanted the 'Squire there with the book of truth.

The deputy sheriff had not long been out of the rural community, and, having announced to succeed his chief, was making a record locating witnesses and defendants. He hopped right to the job, and in due time located 'Squire M'Intosh. But his troubles had just begun. 'Squire M'Intosh upon inquiry stated that he had heard of a Teckum family in Antioch township, 40 miles away, in the extreme eastern part of the county, and referred him to a patriarch in that community. Away flew our deputy on his horse. The patriarch upon being located, and unwilling to let it become even rumor that he was unacquainted in his community, stated that there was a Teckum family lived there, but that all of the members were long since dead, and that Dices Teckum was an adopted daughter of Abraham Teckum, and that her surname was before adoption, Dices, and that she had always been known as Dices Teckum. However, she had died of smallpox, about twenty-two years ago. The deputy hastily made a non est return on the pommel of his saddle, inquired about the cur dogs and the turnip patches in the community, pledged himself to go after the tax-dodger if elected sheriff, and returned to the county seat, where he related to the deputy clerk what has been stated, in explanation of excessive mileage fees. Then quoth the deputy clerk to the deputy sheriff:

"Bill, I knowed there wasn't no such person. Buck Andrews was just hankering after a continuance."

Then quoth the deputy sheriff to the deputy clerk.

"Oh yes, Raymond, there was, because I went to the funeral."

A Pass That Was Honored. I was practising law in Nevada, and had successfully defended some men who were accused of stage robbery. A week afterwards with some companions I was "seeing off" a London mining expert who was about to depart on the stage coach. After a round of drinks he said to me, jocularly, "I may meet some of your clients on the road, I wish you would give me a pass." "Certainly" I replied. I stepped to the hotel desk, and on a sheet of my office paper which I happened to have in my pocket, wrote: "To all road agents: Please pass the bearer and oblige me"—signing my name thereto. With a laugh he pocketed the note, and we bade each other good-bye.

That night, sure enough, the stage was stopped, and the passengers lined up and relieved of their money and valuables by masked highwaymen. When my friend was reached he handed my note to the robber, exclaiming, "Here, my man, is a note for you." The robber carried it to the stagecoach lamp, read it, and handed it to the captain of the gang, who read it, and with a grin that could be seen below his mask, exclaimed, "That's good!" and passed the bearer of the note without robbing him.

Months afterward, I received from the county jail a message from a man who was accused of being a participant in a shooting scrape, that he desired to

see me. I went there. He said that he desired to employ me to defend him. "I have no cash to pay a fee," said he, but maybe this will serve for one. He handed me the pass I had issued. "It's good," said I. Could I have said less?—Thomas Fitch of Los Angeles, Cal.

The Sheriff Stung. "In Texas," says a traveling man, "commercial travelers must, under the law, purchase a license before they can do business in that state. Now this statute was either unknown or disregarded by a certain patent-medicine man from Boston. He was just emerging from a drug store, where he had placed an order, when a stranger approached and addressed him:

"You sell Boston Bitters, don't you?"

"Yes," said the drummer, "and I'd like to sell you a case."

"All right. How much?" asked the stranger, producing his roll, and handing over the $5 demanded, receiving in exchange an order on the local freight office for his case.

"Now," continued the stranger, "I'd like to see your license to peddle—I'm the sheriff."

"You've got me—twenty-five, isn't it?" asked the drummer, offering the money. "I don't suppose it will be necessary for me to appear."

"No, that will be all right," said the sheriff. Then he looked at the order for the case of medicine. "What am I going to do with this stuff?" he asked.

"I'll give you a dollar for it," said the drummer, and the trade was made.

"And do *you* happen to have a license to peddle?" asked the drummer. "I thought not. Well, you have been trading with me, selling goods without a license. Guess I'll file a complaint against you," he added, sweetly.

And the next morning the sheriff sheepishly paid a fine of $25.

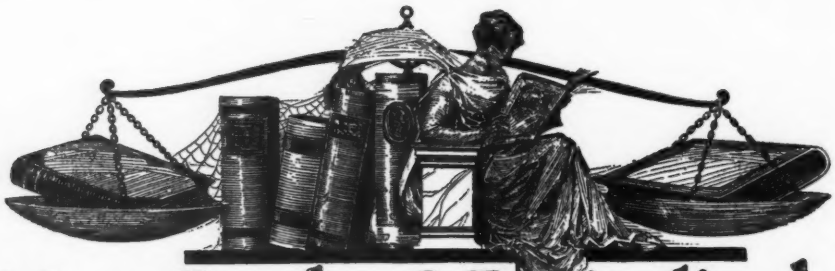
Concerning Wills. Judge Kinkade, of Columbus, Ohio, proposes that wills be probated before death. That is, he believes it would be well to allow men to go into court and to show their competency to make a will, so that, after death, the will cannot be successfully contested. It is the most sensible proposition that has been made since the invention of wills.

At this time it is practically impossible for a will to be so drawn that it cannot be defeated in its aims. The most prevalent method of defeating wills is to allege "undue influence" or mental incompetency. After a man has been dead for a year or so, interested parties have little trouble showing that he was mentally unbalanced. In fact, almost any man can be shown to be mentally deficient after he is dead, especially where it will pay somebody to make the showing. So it happens that the courts are clogged with contests, with the chances in favor of overthrowing the intentions of the dead man or woman.

If Judge Kinkade's idea were worked out, it would be possible for a man to make a will and go into court and have it attested. Then it would be impossible to defeat it; in fact, the courts would not entertain a motion to overthrow it, after they had already passed upon it during the life of the testator. So it is to be hoped there will be such discussion of the judge's proposition that laws will be passed to abate the constantly increasing nuisance of not only defeating the aims of testators, but of tarnishing the memory of the dead.—The Dayton News.

Too Religious for Law. Because of religious scruples a New Jersey lawyer has asked the supreme court to revoke his license to practise law and Governor Fielder to cancel his commission as a notary public. The governor has done as requested, but the supreme court is still considering the application.

His change of mind came after he had read the thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh verses in the fifth chapter of Matthew. That part of the Scripture admonishes against forswearing oneself, saying "Swear not at all; neither by heaven, for it is God's throne; nor by the earth, for it is His footstool; neither by Jerusalem, for it is the city of the great King; neither shalt thou swear by the head, because thou canst not make one hair white or black."



New Books & Periodicals

Periodicals are the dead leaves that fertilize the soil of literature.

"Rights and Duties of Neutrals." By Daniel Chauncey Brewer (G. P. Putnam's Sons, New York.) $1.25.

The importance of the questions discussed in this volume is shown, in part, by the author's statement that "the laws affecting neutrality for the next century are to be determined largely by the attitude of the United States during the present European conflict."

While the author believes, and has not hesitated to point out, that many customs incorporated in the law of nations are based on faulty logic, and should be eliminated or modified, he is impressed by the fact that law, to be of value, must be authoritative. This has led him to exercise great care to state what appears to be the positive law of nations, and to make it clear that the latter must control until revision is made. He has aimed to present the law affecting the rights and duties of neutrals as it is, and with sufficient particularity to make it useful either for reference by officials and men of affairs, or as a text-book for students.

This volume, which is well worth perusal, treats one new feature of immense interest to the United States. This has to do with the plotting of foreign belligerent agents, whether official or otherwise, in a neutral country.

"Trusts, Pools and Corporations." (Revised Edition.) Edited by William Z. Ripley, Ph. D., Professor of Economics, Harvard University. (Ginn & Co., Boston.) $2.75.

In the revised edition of this standard text-book 400 pages of new material have been added. The book is an application of the case system, in use in so many of our law schools, to the study of economics. Most of the chapters deal with a "single, definite, typical phase of the general subject of industrial combination." They are taken from the voluminous outpourings of economic journals and treatises, from legal decisions, and particularly from the testimony given before courts, and thenceforth lost in the impenetrable jungles of court records.

The text of the Federal Trade Commission and Clayton acts of 1914, together with a careful examination of the significance of the anti-trust law as it now stands thus amended, makes the volume handy for reference.

The timeliness of the revised edition is illustrated by its inclusion of the National Cash Register Case, the Steel Corporation Case of June, 1915, the Keystone Watch Decision, and other recent cases of the greatest moment.

"Shippers and Carriers of Interstate and Intrastate Freight." By Edgar Watkins. (The Harrison Co., Atlanta, Ga.) $7.50.

In this treatise the author presents the law relating to the rights and duties of shippers and carriers,—especially in its recent developments. New regulations, both Federal and state, and novel decisions, have been abundant in this live and growing branch of the law. The purpose of the work is to make the laws more easily available and understandable.

Some important questions relating to the subject of the book are still in process of settlement. In these instances the existing decisions have been referred to and discussed. The Act to Regulate Commerce has been annotated not only with the decisions of the courts, but also with the opinions of the Interstate Commerce Commission. The Conference Rulings of that body are also included. Pertinent legislation, such as the Sherman and Clayton anti-trust statutes, the Twenty-Eight Hour Law, etc. is cited and discussed.

Lawyers called upon to advise their clients as to rights and liabilities growing out of the law relating to transportation, will find this book most serviceable.

"American Government and Majority Rule." By Edward Elliott, Ph. D. (Princeton University Press, Princeton, N. J.) $1.25 net.

It is the declared purpose of this volume to point out the fact that the people of the United States have been hindered in the attainment of democracy, or the rule of the majority, by the form of government through which they have been compelled to act. The author believes that the number of elective officers and the frequency of elections have made it practically impossible for the voter to cast his ballot intelligently. His remedy for this condition is the short ballot. He also advocates the appointment of judges.

The book is a thoughtful and ably presented plea for greater simplicity in our form of government.

"The Blackest Page of Modern History." By Herbert Adams Gibbons, Ph. D. (G. P. Putnam's Sons, New York.) 75 cents.

This volume deals with the slaughter and deportation of the Armenians during 1915. In his foreword the writer says: "It is because the Armenian massacres in Turkey are clearly established, because responsibilities can be definitely fixed, and because an appeal to humanity can be made on behalf of the remnant of the Armenian race in the Ottoman Empire without the slightest suspicion of political interest, that the author deems it advisable and imperative at this moment to call attention to what is undoubtedly the blackest page in modern history, to set forth the facts and to point out the responsibilities."

In conclusion the question is asked: "Have neutral nations any responsibility in regard to the Armenians?"

"Cases on the Law of Public Service." By Charles K. Burdick (Little Brown & Co., Boston) $4 net.

This volume contains a selected line of cases dealing with the law of public service, and extending from the Year Books down to the recent decisions. Helpful annotation in the form of footnotes is appended to many of the cases.

The decisions are grouped in chapters under such titles as "The Bases of the Duties of Public Service;" "The Service to be Rendered;" "The Right to Make Rules for the Service;" "Rates;" "Discrimination;" "Duty to Furnish Adequate Facilities;" "Withdrawal from Public Service." The act to regulate commerce as amended is presented in an Appendix.

Old, Curious and Scarce English Publications, may be procured from the Kelly Law Book Co., 57 Carey Street, Chancery Lane, London, W. C., England.

Glass, Workmen's Compensation Law, 1 vol. $5.

Speer, Marital Rights (Texas) 1 vol. $7.50.

Ehrich, Manfred W., The Law of Promoters, 1 vol. $6.50.

Harlan & McCandless, Federal Trade Commission, 1 vol. $2.50.

Recent Articles of Interest to Lawyers

America.

"America First."—The Fra, February, 1916, p. 149.

Arbitration.

"The Justiciability of International Disputes."—10 American Political Science Review, 70.

Army and Navy.

"National Defense—Constitutionality of Pending Legislation."—64 University of Pennsylvania Law Review, 347.

Associations.

"The Personality of Associations."—29 Harvard Law Review, 404.

Attorneys.

"After You Hang Out Your Shingle."—27 American Legal News, 19.

"The Lawyer on the Frontier."—50 American Law Review, 27.

Automobiles.

"Liability of Owner for Negligence of a Member of His Family in Operating Automobile."—52 Canada Law Journal, 52.

Bankruptcy.

"Rent As a Priority Claim in Bankruptcy in Virginia."—3 Virginia Law Review, 366.

Banks.

"Counsel for Michigan Trust Companies Deny Arguments of Federal Reserve Board Regarding Grant of Trust Powers to Banks."—22 Trust Companies, 147.

"Federal Reserve and State Institutions."—22 Trust Companies, 139.

"Modern Banking and Trust Company Methods."—33 Banking Law Journal, 147.

"The Law of Banking."—33 Banking Law Journal, 135.

Bills and Notes.

"The Negotiability of Deeds of Trust Securing Negotiable Notes in Virginia."—3 Virginia Law Review, 296.

Blue Sky Laws.

"Blue Sky Law."—36 Canadian Law Times, 37.

Carriers.

"Railroad Regulation in Illinois and Elsewhere."—10 Illinois Law Review, 402.

"Some Aspects of Carrier Regulation."—9 Lawyer and Banker, 6.

Commerce.

"Have We the Price of Admission?" (Foreign Trade Problems.)—Everybody's Magazine, March 1916, p. 278.

Commercial Law.

"Commercial Law."—27 American Legal News, 11.

Confiscation.

"The Road to Confiscation." (Denial of

Compensation to Individual Whose Property Rights are Damaged or Destroyed by Prohibiting Legislation.)—25 Yale Law Journal, 285.

Conflict of Laws.

"Comity and the Capacities of Companies."—36 Canadian Law Times, 98.

Constitutional Law.

"The Attempted Revision of the State Constitution of New York."—10 American Political Science Review, 20.

"The Need of Constitutional Restraints."—10 Illinois Law Review, 399.

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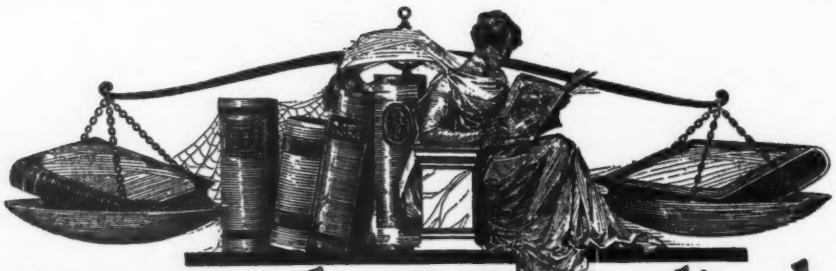
"Usury Laws Affecting National Banks."—3 Virginia Law Review, 331.

The Lawyer and the People

In our country, even within my own time, a lawyer's office today compared with the office thirty or forty years ago is often as a palace to a hovel. Then his books were few and might be found on a single shelf. To-day in our cities a firm of lawyers will occupy a whole floor of many rooms in a modern office building; there may be ten to forty employees; the work is divided into parts suited to each man; the whole thing is a system. . . . Society itself has changed. New inventions and new development of our resources, with contesting interests and application of old principles to new facts and conditions, have demanded men more highly developed, more refined, better educated.

If it was true in ancient times that "of the making of many books there is no end and much study is weariness of the flesh," how much this idea palls upon us today, with our library shelves groaning with the weight of their burden, and the lawyer almost lost in the maze of varying and contradictory opinions, and his purse scant from continual buying of books! With a long list of reports from the supreme and often inferior courts of every state, and the various Federal courts, great institutions giving us continually new digests—first, second, and third editions—on almost every subject of the law. Often, when we study all we can get, we wonder what the law is. . . .

Transportation, titles to property, commerce in all its phases, patents, trademarks, copyrights, and infringements of these, criminal law involving the peace and security of society, make larger and larger demands on the lawyer, and he has met the demands.—From address of Hon. J. W. Vandervort, President West Virginia Bar Association.



New Books & Periodicals

Periodicals are the dead leaves that fertilize the soil of literature.

"Rights and Duties of Neutrals." By Daniel Chauncey Brewer (G. P. Putnam's Sons, New York.) $1.25.

The importance of the questions discussed in this volume is shown, in part, by the author's statement that "the laws affecting neutrality for the next century are to be determined largely by the attitude of the United States during the present European conflict."

While the author believes, and has not hesitated to point out, that many customs incorporated in the law of nations are based on faulty logic, and should be eliminated or modified, he is impressed by the fact that law, to be of value, must be authoritative. This has led him to exercise great care to state what appears to be the positive law of nations, and to make it clear that the latter must control until revision is made. He has aimed to present the law affecting the rights and duties of neutrals as it is, and with sufficient particularity to make it useful either for reference by officials and men of affairs, or as a text-book for students.

This volume, which is well worth perusal, treats one new feature of immense interest to the United States. This has to do with the plotting of foreign belligerent agents, whether official or otherwise, in a neutral country.

"Trusts, Pools and Corporations." (Revised Edition.) Edited by William Z. Ripley, Ph. D., Professor of Economics, Harvard University. (Ginn & Co., Boston.) $2.75.

In the revised edition of this standard text-book 400 pages of new material have been added. The book is an application of the case system, in use in so many of our law schools, to the study of economics. Most of the chapters deal with a "single, definite, typical phase of the general subject of industrial combination." They are taken from the voluminous outpourings of economic journals and treatises, from legal decisions, and particularly from the testimony given before courts, and thenceforth lost in the impenetrable jungles of court records.

The text of the Federal Trade Commission and Clayton acts of 1914, together with a careful examination of the significance of the anti-trust law as it now stands thus amended, makes the volume handy for reference.

The timeliness of the revised edition is illustrated by its inclusion of the National Cash Register Case, the Steel Corporation Case of June, 1915, the Keystone Watch Decision, and other recent cases of the greatest moment.

"Shippers and Carriers of Interstate and Intrastate Freight." By Edgar Watkins. (The Harrison Co., Atlanta, Ga.) $7.50.

In this treatise the author presents the law relating to the rights and duties of shippers and carriers,—especially in its recent developments. New regulations, both Federal and state, and novel decisions, have been abundant in this live and growing branch of the law. The purpose of the work is to make the laws more easily available and understandable.

Some important questions relating to the subject of the book are still in process of settlement. In these instances the existing decisions have been referred to and discussed. The Act to Regulate Commerce has been annotated not only with the decisions of the courts, but also with the opinions of the Interstate Commerce Commission. The Conference Rulings of that body are also included. Pertinent legislation, such as the Sherman and Clayton anti-trust statutes, the Twenty-Eight Hour Law, etc. is cited and discussed.

Lawyers called upon to advise their clients as to rights and liabilities growing out of the law relating to transportation, will find this book most serviceable.

"American Government and Majority Rule." By Edward Elliott, Ph. D. (Princeton University Press, Princeton, N. J.) $1.25 net.

It is the declared purpose of this volume to point out the fact that the people of the United States have been hindered in the attainment of democracy, or the rule of the majority, by the form of government through which they have been compelled to act. The author believes that the number of elective officers and the frequency of elections have made it practically impossible for the voter to cast his ballot intelligently. His remedy for this condition is the short ballot. He also advocates the appointment of judges.

The book is a thoughtful and ably presented plea for greater simplicity in our form of government.

"The Blackest Page of Modern History." By Herbert Adams Gibbons, Ph. D. (G. P. Putnam's Sons, New York.) 75 cents.

This volume deals with the slaughter and deportation of the Armenians during 1915. In his foreword the writer says: "It is because the Armenian massacres in Turkey are clearly established, because responsibilities can be definitely fixed, and because an appeal to humanity can be made on behalf of the remnant of the Armenian race in the Ottoman Empire without the slightest suspicion of political interest, that the author deems it advisable and imperative at this moment to call attention to what is undoubtedly the blackest page in modern history, to set forth the facts and to point out the responsibilities."

In conclusion the question is asked: "Have neutral nations any responsibility in regard to the Armenians?"

"Cases on the Law of Public Service." By Charles K. Burdick (Little Brown & Co., Boston) $4 net.

This volume contains a selected line of cases dealing with the law of public service, and extending from the Year Books down to the recent decisions. Helpful annotation in the form of footnotes is appended to many of the cases.

The decisions are grouped in chapters under such titles as "The Bases of the Duties of Public Service;" "The Service to be Rendered;" "The Right to Make Rules for the Service;" "Rates;" "Discrimination;" "Duty to Furnish Adequate Facilities;" "Withdrawal from Public Service." The act to regulate commerce as amended is presented in an Appendix.

Old, Curious and Scarce English Publications, may be procured from the Kelly Law Book Co., 57 Carey Street, Chancery Lane, London, W. C., England.

Glass, Workmen's Compensation Law, 1 vol. $5.

Speer, Marital Rights (Texas) 1 vol. $7.50.

Ehrich, Manfred W., The Law of Promoters, 1 vol. $6.50.

Harlan & McCandless, Federal Trade Commission, 1 vol. $2.50.

Recent Articles of Interest to Lawyers

America.

"America First."—The Fra, February, 1916, p. 149.

Arbitration.

"The Justiciability of International Disputes."—10 American Political Science Review, 70.

Army and Navy.

"National Defense—Constitutionality of Pending Legislation."—64 University of Pennsylvania Law Review, 347.

Associations.

"The Personality of Associations."—29 Harvard Law Review, 404.

Attorneys.

"After You Hang Out Your Shingle."—27 American Legal News, 19.

"The Lawyer on the Frontier."—50 American Law Review, 27.

Automobiles.

"Liability of Owner for Negligence of a Member of His Family in Operating Automobile."—52 Canada Law Journal, 52.

Bankruptcy.

"Rent As a Priority Claim in Bankruptcy in Virginia."—3 Virginia Law Review, 366.

Banks.

"Counsel for Michigan Trust Companies Deny Arguments of Federal Reserve Board Regarding Grant of Trust Powers to Banks."—22 Trust Companies, 147.

"Federal Reserve and State Institutions."—22 Trust Companies, 139.

"Modern Banking and Trust Company Methods."—33 Banking Law Journal, 147.

"The Law of Banking."—33 Banking Law Journal, 135.

Bills and Notes.

"The Negotiability of Deeds of Trust Securing Negotiable Notes in Virginia."—3 Virginia Law Review, 296.

Blue Sky Laws.

"Blue Sky Law."—36 Canadian Law Times, 37.

Carriers.

"Railroad Regulation in Illinois and Elsewhere."—10 Illinois Law Review, 402.

"Some Aspects of Carrier Regulation."—9 Lawyer and Banker, 6.

Commerce.

"Have We the Price of Admission?" (Foreign Trade Problems.)—Everybody's Magazine, March 1916, p. 278.

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"Commercial Law."—27 American Legal News, 11.

Confiscation.

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"Comity and the Capacities of Companies."—36 Canadian Law Times, 98.

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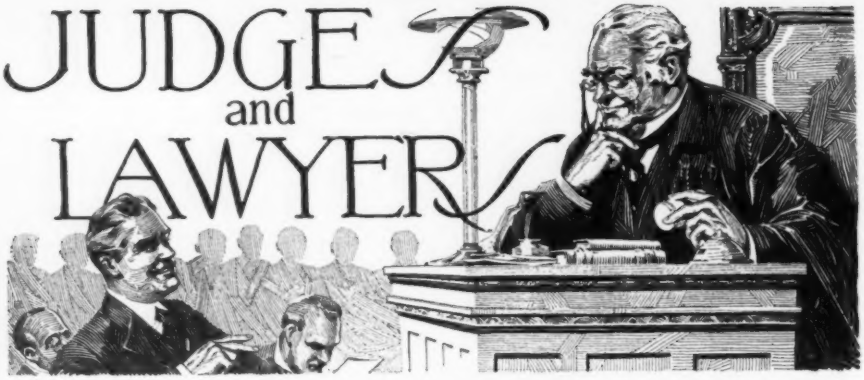
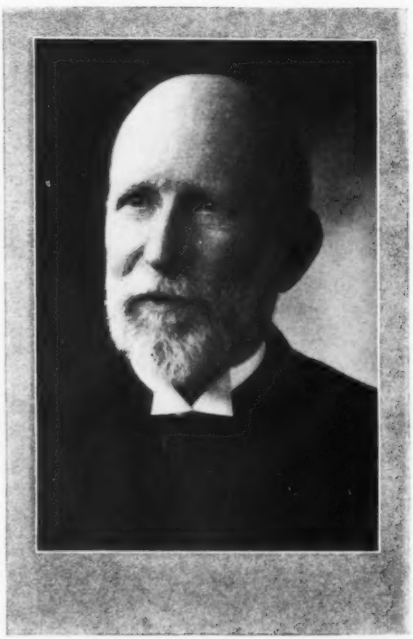


A Record of Bench and Bar

Everett P. Wheeler

Lawyer, Author and Reformer

EVERETT P. WHEELER was born in New York city March 10, 1840. He was educated in the public schools of the city of New York; graduated from the College of the City of New York in 1856, the Harvard Law School in 1859, admitted to the bar in 1861, and has been in active practice in the city of New York ever since that time. Mr. Wheeler was a member of the board of education from 1877 to 1879. He was one of the founders of the New York City Bar Association, and served as a member of its executive committee and as vice president. He was for five years president of the New York Free Trade Club. In 1888 he took part in founding the Reform Club, of which he was president for three years, and for many years an active member. This club took up in that year a campaign for a reform of the tariff and for the re-election of Governor Cleveland. They continued that campaign vigorously for eight years. Mr. Wheeler took frequent part in joint debates in many of the Eastern and Middle States, notably at county fairs. In 1896 the Club took up the campaign for sound money and in the progress of this contest came to advocate reform in the banking system. The tariff and banking laws adopted during the present administration are both on the lines advocated by the club, and are in large measure the harvest of the seed it sowed. Mr. Wheeler was one of the first to take an active part in the renewal, in 1880, of the movement for civil service reform, which



finally resulted in the adoption of the Federal civil service act, and the New York act on this subject now in force. He was for seventeen years chairman of the executive committee of the New York Civil Service Association, was chairman of the City Civil Service Commission for seven years, and is now chairman of the Law Committee of the National Civil Service League, and president of the Civil Service Reform Association.

He was in 1893 a member of the Committee of Seventy, and took an active part in the campaign for the election of Mayor Strong, and also that for the election of Mayor Low, in 1891. In 1894 he was candidate of the Democratic Party Reform Organization for governor of the state of New York. Mr. Wheeler, has always been a member of the Episcopal Church; has been a deputy several times to the General Convention of that Church, and was one of the founders and for two years president of the Episcopal Church club of New York, which was the leader in a federation of church clubs that has accomplished much for religious and social teaching and work.

In 1891 he took an active part in founding, and down to 1909 was president of the East Side House, one of the social settlements in New York city.

He is a member of the Century, Reform, City, and Church Clubs, the New York Historical Society, and the Society of Colonial Wars; and of the New York City, New York State and American Bar Associations. He is president of the City College Club of New York city.

Mr. Wheeler is the author of "Modern Law of Carriers," "Harter Act," "Daniel Webster, the Expounder of the Constitution," "Prize Law," "The Tariff and Wages," "Louisbourg Campaign," "Sir William Pepperrell," "The Knowledge of Faith," and many articles in legal and other periodicals.

He was chairman of the Committee on International Law of the American Bar Association from 1895 to 1908, has been a member of its Council, and is now chairman of its Special Committe on Law Reform. In this capacity he has presented in successive years reports to the association in which the committee has advocated the following fundamental reforms in legal procedure:

A requirement that courts shall decide cases on the merits, and not on technical points or exceptions which do not affect the merits.

The extension of the power of the appellate court to render final judgment, instead of being obliged to order a new trial to correct errors below.

The fusion of law and equity as far as possible under the Federal system, and the prompt correction of mistakes in pleading.

Conferring power upon the Supreme Court to review decisions of the highest court of any state in which the decision is that the law under consideration is in violation of the Constitution of the United States. Bills to accomplish the two latter purposes have become law. A bill to accomplish the former passed the House of Representatives and was reported favorably in the Senate. It is now again before Congress.

As a member of the New York State Bar Association he was one of the first to propose the establishment of a court of review which should diminish the number of appeals to the United States Supreme Court. As chairman of its Law Reform Committee he has succeeded in introducing many reforms into the practice of the state courts. He is now chairman of the Committee on International Arbitration of the New York State Bar Association, and presented at its last meeting a report, which was adopted, recommending that the United States government use its influence after the close of the present war to bring about the limitation of armaments and the establishment of an international police.

Mr. Wheeler's practice has been of a very varied character. He was at one time general counsel for the old Atlantic & Pacific Telegraph Company, and was the leader on its side in the many controversies which it had with the Western Union. Of later years his practice has been largely, but not exclusively, at the admiralty bar.

Personnel of the Federal Trade Commission.

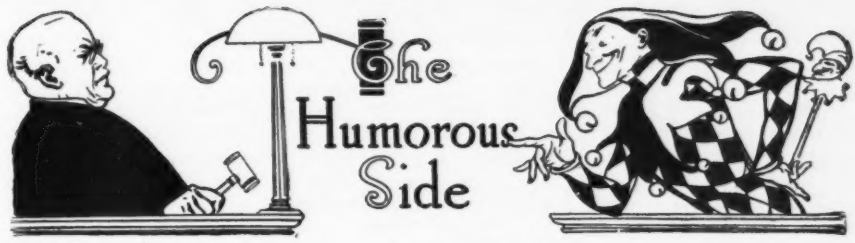
Chairman Davies was born at Watertown, Wisconsin, November 29, 1876. He specialized in economics at the University of Wisconsin, and after his graduation from the law school of the same institution he began his professional work first at Watertown, Wisconsin, and later at Madison, the state capital, covering a wide range of successful experience. Mr. Davies was connected with some of the most important litigation in his state during his practice of law, and was recognized as one of the leading members of the bar of Wisconsin. His experience as Commissioner of Corporations, for the two years immediately preceding the passage of the Federal Trade Commission act, has given him peculiar knowledge and insight into the problems with which the Trade Commission will have to deal in the future.

Vice Chairman Edward N. Hurley, was born at Galesburg, Ill., 1864; he attended the public schools of that city. He spent several years as a traveling salesman, and later organized and managed the Standard Pneumatic Tube Company, of Chicago. He is credited with having originated and developed the pneumatic tool industry in the United States. Mr. Hurley has been a man of large affairs and influence in the Middle West for many years. His activities have run to farming and banking as well as to manufacturing. At the time of his appointment as a member of the Federal Trade Commission he was President of the Illinois Manufacturers' Association, of the Hurley Machine Company, and of the First National Bank of Wheaton, Illinois. In 1914 Mr. Hurley visited South America, and make a study of trade conditions and credits in the more important countries there, acting under a designation by President Wilson.

Commissioner William J. Harris was born February 3, 1868, at Cedartown, Georgia, and was educated at the University of Georgia, class of 1890. Mr. Harris has been engaged in general insurance and in banking all his business life. He was the organizer and president of the Georgia Fire Insurance Company, of Atlanta, organizer and president of the Farmers & Merchants Bank of Cedartown, Georgia, and vice president of the Georgia Bankers' Association. Mr. Harris served for nearly two years as Director of the United States Census, and his experience in this office should prove valuable in his work as a member of the Federal Trade Commission.

Commissioner Parry was born in New York in 1864, and was educated at the University of New York. He began life in the newspaper business, and at one time was city editor of the Seattle Post-Intelligencer. He was chairman of the finance committee which had charge of the finance of the Alaska-Yukon Exposition at Seattle, which paid a dividend to its stockholders. He also served as city comptroller and later president of the city council of Seattle, and at the time of his appointment as a member of the Federal Trade Commission was treasurer of the Seattle Chamber of Commerce, chairman of the board of Directors of the State Bank of Seattle; president of the Seattle-Lake Washington Waterway Company, which reclaimed tide lands, and general manager of the Seattle General Contract Company. Mr. Parry was manager of the shipbuilding plant which built the battleship Nebraska.

Commissioner George Rublee was born at Madison, Wisconsin, 1868, the son of the late Horace Rublee, one of the great editors of the West. He was graduated from Harvard College in 1890, and from Harvard Law School in 1895. He was instructor at the Harvard Law School in 1895 and 1896, and then entered upon the practice of law, associated with Victor Morawetz, one of the great lawyers of the country. Mr. Rublee was assistant general counsel for the Atchison, Topeka, & Santa Fe Railway, and of many other large interests, during his residence in New York. In 1905 he established a residence in New Hampshire, and since that time, to a large extent, has devoted his abilities and experience to the public service.



I resolved that, like the sun, as long as my day lasted, I would look on the bright side of everything.—Hood.

The Weight of Numbers. Malachi O'Rourke, a familiar character in Chicago, had occasion to appear before a police magistrate to answer a charge of larceny. After hearing the testimony of two witnesses, who said that they saw Malachi take the goods, the judge said:

"Well, Malachi, I think you're guilty."

"An' what makes your Honor think that?" asked the Celt.

"These two men, who say they saw you take the goods."

"An' is that all?" asked Malachi, in surprise, "Why, your Honor, I can bring two hundred men who will swear they didn't see me take the goods."

Had Many Accomplices. Judge—"Did you commit the burglary alone or with the help of others?"

Prisoner—"With the help of about five thousand others."

Judge—"What? Explain yourself."

Prisoner—"Well, you see, judge, the parade called everybody in the house to the front windows, so I had a clear chance to do me work in the back."

Interference with Commerce. A commercial traveler had been summoned as a witness in a case at court, his employers having sued a delinquent customer, and the lawyer for the defense was cross-examining him.

"You travel for Jobson & Company, do you?" asked the attorney.

"Yes, sir."

"How long have you been doing it?"

"About ten years."

"Been traveling all that time, have you?"

"Well, no, sir," said the witness, making a hasty mental calculation, "not exactly traveling. I have put in about four years of that time waiting at railway stations and junctions for trains."

Contrasted Privileges. "Don't you envy the opportunities that great wealth affords?"

"Well," replied the philosopher in overalls, "of course I'd like the limousines and private yachts, but I don't care so much for the alimony arguments and writs of habeas corpus."—Washington Star.

Legal Residence? At a London police court an individual who had been affected by the Salvation Army was brought up charged with being a lunatic wandering at large. The magistrate—a genial old gentleman—asked him if he had any friends.

"The Lord is my only friend," said the prisoner.

"Yes," said the magistrate; "but have you anybody who will become surety for you?"

"The Lord," said the prisoner again, "is my salvation. He will become surety for me."

"Yes; but you see," said the magistrate hesitatingly, "I want the name and address of some friend of yours."

"Address?" shouted the prisoner; "why, the Lord is everywhere!"

"Well, you see," replied the magistrate, "for the purposes of bail we should require some more settled residence."—Argonaut.

Queer Lights. "Speaking purely as a neutral," said Representative Harvey Helm, the other day in Washington, "I can't help remarking what odd lights the

various Powers have to throw on events in order to make them seem favorable to themselves.

"Now England, now Russia, now Germany, and now France, comment on events so strangely that I am reminded of Hellyon.

"Hellyon, talking about his employer, a manufacturer, said:

"'He's no harsh taskmaster. He's no speeder up. Other firms have this here blasted eight-hour law. Ye got to git through a whole day's work in eight hours or out ye go. But down to our place ye can take yer time. Ye got sixteen hours to do a day's work in.'"

Rubbing It In. Representative Hepburn, in an eloquent address at Clarinda, pointed out the many artistic defects of Washington. In the course of his address, which advocated a governing board of artists for Washington, Mr. Hepburn said:

"Our ugly capitol is not a fit place for statesmen of learning and culture. It is only fit for backwoods statesmen, for coarse railers like Brown and Robinson.

"Brown and Robinson, members of a backswood legislature, always mistook abuse for argument. Brown, though, once went too far in a rate-bill debate, —he actually called Robinson a jackass and a donkey. The House, of course, was at once in an uproar, and the speaker said:

"'The gentleman from the ninety-ninth must withdraw that expression.'

"'I do so,' said Brown; 'but I still maintain that the gentleman from the fifth is out of order.'

"'How am I out of order?' shouted Robinson, still smarting under the names he had been called. 'How am I out of order, sir?'

"'Probably a veterinary surgeon could tell you.' Brown replied."

Ample Apology. There is in Congress a Western representative of Celtic origin, who has more than once "stirred up the animals" by his propensity to bait the opposition.

On one occasion he arose to denounce the statements made in a speech that had been delivered by a member of the other party. His impetuosity led him to phrase his remarks rather strongly.

"Order, order!" exclaimed the speaker, pounding with his gavel.

Again, in a minute or two, did the son of Erin return to his charge of wilful misstatement. Again was he called to "order."

It was a critical moment. His colleagues, for motives of policy, did not wish him to be put out of the debate, so they hinted so by tugging vigorously at his coat-tails.

Now, it is a very dangerous matter to trifle with the tails of an Irishman's coat, save in the cause of friendship. Nevertheless, the indignant yet good-humored member recognized the command of his party, and sat down after delivering this Parthian dart:

"I obey the ruling of the House, and I beg to retract what I was about to observe!"

That one touch of Irish oratory took the whole House by storm.—Lippincott's.

Enough Said. A railroad lawyer who has had much to do with human nature says: "Never cross-question an Irishman from the old sod." And he gave an illustration from his own experience:

A section hand had been killed by an express train, and his widow was suing for damages. The main witness swore positively that the locomotive whistle had not sounded until after the whole train had passed over his departed friend.

"See here, McGinnis," said I, "you admit that the whistle blew?"

"Yis, sor, it blew, sor."

"Now, if that whistle sounded in time to give Michael warning, the fact would be in favor of the company, wouldn't it?"

"Yis, sor, and Mike would be testifying here this day." The jury giggled.

"Very well. Now, what earthly purpose could there be for the engineer to blow his whistle after Mike had been struck?"

"I preshume thot the whistle wos for the next man on the track, sor."

I quit, and the widow got all she asked.